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CONTAINING

ASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH

REPORTED BY

ivy Council
gh Court, Allahabad

J V WOODMAN, *Middle Temple*
W K. PORTER, *Gray's Inn*

VOL XXXVI.
1914

ALLAHABAD
PRINTED BY W C ABEL OTTO SUPERINTENDENT GOVERNMENT PRESS
AND PUBLISHED AT THE GOVERNMENT BOOK DÉPOT
UNDER THE AUTHORITY OF THE GOVERNOR GENERAL IN COUNCIL
Price, Re 1



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Ditto	In [illegible]	[illegible]	([illegible])
Act III of 1911 (Criminal Tribes)	[illegible]	[illegible]	([illegible])
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Act V of 1911 [Tramways (Amendment)]	[illegible]	[illegible]	(1a)
Ditto	In [illegible]	[illegible]	([illegible])
Act VI of 1911 [Tariff (Amendment)]	In Urdu	[illegible]	(1a)
Ditto	In Nagri	[illegible]	([illegible])
Act VII of 1911 [Indian Paper Currency (Amendment)]	In Urdu	[illegible]	(1a)
Ditto ditto	In Nagri	[illegible]	([illegible])
Act VIII of 1911 (Indian Army)	In Urdu	[illegible]	([illegible])
Ditto	In Nagri	[illegible]	([illegible])
Act X of 1911 (Prevention of Seditious Meetings)	In Urdu	[illegible]	(1a)
Ditto	In Nagri	[illegible]	(1a)
Act XI of 1911 [University (Amendment)]	In Urdu	3p	(1a)
Act XII of 1911 (Factories)	In Urdu	1a 6p	([illegible])
Ditto	In Nagri	1a 6p	([illegible])
Act XIII of 1911 [Christian Marriage (Amendment)]	In Urdu	[illegible]	(1a)
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Ditto	In Nagri	[illegible]	(1a)
Act XV of 1911 [Mutual (Amendment)]	In Urdu	[illegible]	(1a)
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Act XVI of 1911 [Bengal, Agra and Assam Civil Courts (Amendment)]	In Urdu	[illegible]	(1a)
Act XVII of 1911 (Airships)	In Urdu	[illegible]	(1a)
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Act V of 188 (u l L e nts u nd d by th Rep al ng nd Amend ng Act 15 1 (XII 1 1891) — 8a. (1a)
Act XII of 18 (Indian S lt) as mod fied up to 1st August 1909 — 7a (2a.)
Act XV of 188 (Pres d ncy Sm ll Cause Courts) as mod fied up to 1st June 1906 — 10a. (2a.)
Act V 1883 (Ind n ufer h nt Sl pp) as mod fied up to 1st September 1909 — 6a. (1a)
Act VIII of 1883 (L t l Cocos and P arls Islands L ws); as mod fied up o 1st October 190 — 1a. 3p (1a)
Act XIX of 1883 (Land Improvement Loans) as modified up to 1st September 1906 — 2a 6p (1a.)
Act VII of 1884 (Indian Steam hips) as mod fi d up to 1st July 1890 — 6a. (1a.)
Act IX of 1884 (L al Pract tioners) as mod fied up to 30th June 1909 — 1a 6p (1a.)
Act XII of 1884 (Agricultur st Loans), as modifi d up to 1st February 1903 — 2a (1a.)
Act XVIII of 1884 (Punjab Cou ts), as mod fi l p to 1st December 1899 — 7a (1a.)
Act XIII of 1885 (Ind an T l raph) a mod fi l up to 1s June 1910 — 5a (1a.)
Act II of 1886 (Indian Income tax) as mod f d up to 1st Apr l 1903 — 8a (1a. 6p)
Act VI of 1886 (B rths Deaths and Marriag s R gistrat on) as modified up to 1st May 1911 — 6a. (1a.)
Act XI of 1886 (Ind an T am v ys) s mod fied up to 1 t Decemb r 1903 — 9a. (2a.)
Act XIII of 1886 (Ind an Secu ties) as am nd d by Act XII o 1891 — 2a. 9p (1a.)
Act VII of 1887 (Suits Valuation) as mod fi d u to 1st November 1901 — 1a. 9p (1a.)

Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December 1900 . . .. .. 6a (1a)
Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899 8a (1a)
Act III of 1888 (Police) as modified up to 1st January 1909 . 1a 9p (1a)
Act I of 1889 (Metal Tokens) as modified up to 1st April 1904 .. 1a 9p (1a)
Act II of 1889 (Measures of Length) with footnotes . .. 1a 3p (1a)
Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st August 1908 .. . . . 6a (1a)
Act VI of 1889 (Probate and Administration) as modified up to 1st January 1909 2a 9p (1a)
Act VII of 1889 (Succession Certificate) as modified up to 1st June 1910 5a 6p (1a) /
Act XV of 1889 (Indian Official Secrets) as modified up to 1st April 1904 3a (1a)
Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1908 .. . .. 2a 6p (1a.)
Act IX of 1890 (Indian Railways) as modified up to 1st June 1909 Rs 1 2 (2a)
Act X of 1890 (Press and Registration of Books) as modified up to 1st December 1904 . .. 2a 3p (1a.)
Act XI of 1890 (Prevention of Cruelty to Animals) with footnotes . 2a. (1a)
Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 .. .. 1a 6p (1a)
Act X of 1891 (Indian Criminal Law Amendment) as modified up to 1st August 1909 . .. 1a (1a)
Act XII of 1891 (Amending Act) showing the Schedules as modified up to 31st May 1902 12a (1a 6p)
Act XIV of 1891 (Oudh Courts) as amended by the Oudh Courts Act (1891) Amendment Act, 1897 1a 3p (1a.)
Act I of 1894 (Land Acquisition) with footnotes . . 7a (1a.)
Act VIII of 1894 (Indian Tariff) as modified up to 1st February 1906 9a (2a)
Act IX of 1894 (Prisons) as amended by the Burma Laws Act 1898 7a 6p (1a 6p)
Act XII of 1896 (Excise) as modified up to 1st March 1907 8a (2a)
Act IV of 1897 (Indian Fisheries) with footnotes . 1a 9p (1a)
Act IX of 1897 (Provident Funds), as modified up to 1st April 1903 1a 6p (1a)
Act X of 1897 (General Clauses) as modified up to 1st February 1910 5a 6p (1a 6p)
Act III of 1898 (Lepers) as modified up to 1st September 1909 4a (1a)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1909 . Rs 3 10 (8a)
Act II of 1899 (Indian Stamp) as modified up to 1st March 1907 *Rs 1* *(2a)*
Act VIII of 1899 (Indian Petroleum) as modified up to 1st July 1911 7a 3p (1a 6p)
Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 . 2a 6p (1a)
Act XVI of 1899 (Northern India Canal and Drainage) with footnotes . 1a. (1a)
Act XIX of 1899 [Currency Conversion (Army)] as amended by Act VII of 1900 .. . 1a (1a)
Act III of 1900 (Prisoners) as modified up to 1st July 1910 6a 6p (1a.)
Act VI of 1901 (Assam Labour and Emigration) as modified up to 1st July 1910 . . . Rs 1-4 (2a.)
Act II of 1902 [Cantonments (House Accommodation)] as modified up to 1st June 1910 6a 6p (1a)
Act XV of 1903 (Indian Extradition) as modified up to 1st December 1904 5a 6p (1a)
Act I of 1904 (Poisons) with footnotes . 2a 9p (1a)
Act II of 1904 (Central Provinces Courts) as modified up to 1st December 1910 . . .. 4a 3p (1a)
Act I of 1910 (Indian Press) with footnotes .. 3a 6p (1a.)
Regulation III of 1818 (Bengal State Prisoners) as modified up to 1st August 1909 .. .. . 2a 9p (1a.)

Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909 .. .. .. 6a 6p (1a)
Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903 . .. . 1a 9p (1a.)
Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897 .. .. 5a 6p (1a)
Regulation I of 1886 (Assam Land and Revenue) as modified up to 1st June 1894 .. .. 13a. (2a)
Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911 .. . .. . 15a (2a)
Regulation VI of 1886 (Ajmer Rural Board) as modified up to 1st February 1897 . . .. 5a 6p (1a)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899 . . .. .. 4a, 9p (1a)
Regulation I of 1895 (Kachin Hill Tribes) as modified up to 1st April 1903 6a (1a)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1910 .. ..
Regulations made under the Statute 33 Vict, Cap 3, from No II of 1875 to 1910 8vo. Stitched
[The above may be obtained separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901 In Urdu 2a. 6p (1a)
Act XVIII of 1850 (Judicial Officers' Protection) with footnotes .. In Urdu 6p (1a.)
Ditto ditto .. In Nagri 6p (1a)
Act XXI of 1850 (Removal of Caste Disabilities), with footnotes .. In Urdu 3p (1a.)
Ditto ditto .. In Nagri 3p (1a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903 In Urdu 6p (1a)
Ditto ditto In Nagri 6p (1a)
Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908 . . .. .. In Urdu 9p (1a.)
Ditto ditto .. In Nagri 9p (1a.)
Act XXX of 1852 (Naturalization) as modified up to 1st December 1902 .. In Urdu 6p (1a)
Ditto ditto .. In Nagri 6p (1a)
Act XII of 1855 (Legal Representatives Suits), as modified up to 1st November 1904 . . .. In Urdu 3p (1a)
Ditto ditto .. In Nagri 3p (1a)
Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903 .. .. In Urdu 6p (1a.)
Ditto ditto .. In Nagri 6p (1a)
Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903 .. .. .. In Urdu 3p (1a.)
Ditto ditto .. In Nagri 3p (1a.)
Act XV of 1856 (Hindu Widow's Re-marriage) .. .. .. In Urdu 6p (1a.)
Ditto ditto .. In Nagri 6p (1a)
Act XX of 1856 (Bengal Chaukidari) as modified up to 1st November 1903 In Urdu 2a 6p (1a.)
Ditto ditto .. In Nagri 2a 6p (1a)
Act XIII of 1857 (Opium) as modified up to 1st August 1903 .. In Urdu 9p (1a.)
Ditto ditto .. In Nagri 9p (1a)
Act IX of 1859 (Forfeiture), as modified up to 1st October 1903 .. In Urdu 3p (1a.)
Ditto ditto .. In Nagri 3p. (1a.)

Act IX of 1887 (Provincial Small Cause Courts) as modified up to 1st December 1900 .. .. 6a (1a)
Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899 8a (1a)
Act III of 1888 (Police) as modified up to 1st January 1909 . 1a 9p (1a)
Act I of 1889 (Metal Tokens) as modified up to 1st April 1904 .. 1a 9p (1a)
Act II of 1889 (Measures of Length) with footnotes . .. 1a 3p (1a)
Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908 .. . .. . 6a (1a)
Act VI of 1889 (Probate and Administration) as modified up to 1st January 1909 . . 2a 9p (1a)
Act VII of 1889 (Succession Certificate) as modified up to 1st June 1910 5a 6p (1a)
Act XV of 1889 (Indian Official Secrets) as modified up to 1st April 1904 3a (1a)
Act VI of 1890 (Charitable Endowments) as modified up to 1st August 1903 .. .. 2a 6p (1a.)
Act IX of 1890 (Indian Railways) as modified up to 1st June 1909 Re 1 2 (2a)
Act X of 1890 (Press and Registration of Books) as modified up to 1st December 1901 .. .. 2a 3p (1a.)
Act XI of 1890 (Prevention of Cruelty to Animals) with footnotes . 2a. (1a)
Act XIII of 1890 (Excise Malt Liquors) as modified up to 1st October 1908 .. . . 1a 6p (1a)
Act X of 1891 (Indian Criminal Law Amendment) as modified up to 1st August 1909 .. .. 1a (1a)
Act XII of 1891 (Amending Act) showing the Schedules as modified up to 31st May 1902 . 12a (1a 6p)
Act XIV of 1891 (Oudh Courts) as amended by the Oudh Courts Act (1891) Amendment Act 1897 . 1a 3p (1a.)
Act I of 1894 (Land Acquisition) with footnotes 7a (1a.)
Act VIII of 1894 (Indian Tariff) as modified up to 1st February 1906 9a (2a)
Act IX of 1894 (Prisons) as amended by the Burma Laws Act 1898 7a 6p (1a 6p)
Act XII of 1896 (Excise) as modified up to 1st March 1907 8a (2a)
Act IV of 1897 (Indian Fisheries) with footnotes 1a 9p (1a)
Act IX of 1897 (Provident Funds), as modified up to 1st April 1903 1a 6p (1a)
Act X of 1897 (General Clauses) as modified up to 1st February 1910 5a 6p (1a 6p)
Act III of 1898 (Lepers) as modified up to 1st September 1909 4a (1a)
Act V of 1898 (Code of Criminal Procedure) as modified up to 1st August 1909 .. . Rs 3-10 (8a)
Act II of 1899 (Indian Stamp) as modified up to 1st March 1907 Re 1 (2a)
Act VIII of 1899 (Indian Petroleum) as modified up to 1st July 1911 7a 9p (1a 6p)
Act XIII of 1899 (Glanders and Farcy) as modified up to 1st February 1908 . 2a. 6p (1a)
Act XVI of 1899 (Northern India Canal and Drainage) with footnotes 1a. (1a)
Act XIX of 1899 [Currency Conversion (Army)] as amended by Act VII of 1900 .. . . 1a (1a)
Act III of 1900 (Prisoners) as modified up to 1st July 1910 . 6a 6p. (1a)
Act VI of 1901 (Assam Labour and Emigration) as modified up to 1st July 1910 .. . Re 1-4. (2a)
Act II of 1902 [Cantonments (House accommodation)], as modified up to 1st June 1910 6a 6p (1a)
Act XV of 1903 (Indian Extradition) as modified up to 1st December 1904 5a 6p (1a.)
Act I of 1904 (Poisons) with footnotes 2a. 9p (1a)
Act II of 1904 (Central Provinces Courts) as modified up to 1st December 1910 .. . . 4a 3p (1a)
Act I of 1910 (Indian Press) with footnotes .. 3a 6p (1a)
Regulation III of 1818 (Bengal State Prisoners) as modified up to 1st August 1909 .. .. 2a. 9p. (1a)

Regulation III of [illegible] ([illegible] Parganas Settlement) as modified up to 1st March [illegible] 6a 6p (1a)

Regulation V of [illegible] ([illegible] Frontier) as modified up to 1st [illegible] 1a 9p (1a)

Regulation III of [illegible] (Andaman and Nicobar Islands) as modified up to 1st February [illegible] 5a 6p (1a)

Regulation I of [illegible] (Assam Land and Revenue) as modified up to 1st [illegible] .. . [illegible] (2a)

Regulation [illegible] as modified up to 1st [illegible] . .. [illegible] (2a)

Regulation [illegible] as modified up to 1st February [illegible] . 5a 6p (1a)

Regulation [illegible] Justice) as modified up to 1st October [illegible] . .. 4a 9p (1a)

Regulation [illegible] Tribes) as modified up to 1st April 1902 6a (1a)

III.—ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (unrepealed) of the [illegible] General of India in Council [illegible] from 1834 to 19[illegible] .. .. ..

Regulations made under the Statute 33 Vict., Cap. 3 from No. II of 1875 [illegible]

[The above may be [illegible] separately. The price is noted on each.]

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

Acts X of 1841 and XI of 18[illegible] (Registration of Ships) as modified up to 1st December 19[illegible] [illegible] brought down to 1st December 1901 In Urdu 2a 6p (1a)

Act XVIII of 1850 (Judicial Officers' Protection) with footnotes .. In Urdu [illegible]p (1a)

Ditto ditto .. In Nagri [illegible]p (1a)

Act XXI of 1850 (Removal of Caste Disabilities), with footnotes .. In Urdu 3p (1a)

Ditto ditto .. In Nagri 3p (1a)

Act XXXIV of 1850 (State Prisoners) as modified up to 30th April 1903 In Urdu 6p (1a)

Ditto ditto In Nagri [illegible]p (1a)

Act XXXVII of 1850 (Public Servants Inquiries) as modified up to 1st August 1903 .. .. .. In Urdu 9p (1a)

Ditto ditto .. In Nagri 9p (1a)

Act XXX of 1852 (Naturalization) as modified up to 1st December 1902 .. In Urdu [illegible]p (1a)

Ditto ditto .. In Nagri [illegible]p (1a)

Act XII of 1855 (Legal Representatives' Suits) as modified up to 1st November 1904 . . .. In Urdu 3p (1a)

Ditto ditto .. In Nagri 3p (1a)

Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903 .. .. In Urdu 6p (1a)

Ditto ditto .. In Nagri 6p (1a)

Act XX[illegible] of 1855 (Mortgaged Estates Administration) as modified up to 1st October 1[illegible]09 .. . . In Urdu 3p (1a)

Ditto ditto .. In Nagri 3p (1a)

Act X[illegible] of 1856 (Hindu Widows' Re-marriage) .. .. .. In Urdu 6p (1a)

Ditto ditto .. In Nagri [illegible]p (1a)

Act XX of 1856 (Bengal Chaukidari) as modified up to 1st November 1903 In Urdu [illegible]

Ditto ditto In Nagri [illegible]

Act XIII of 1857 (Opium) as modified up to 1st August 1903 .. In Urdu [illegible]

Ditto ditto .. In Nagri [illegible]p

Act IX of 1859 (Forfeiture) as modified up to 1st October 1903 .. In Urdu 3p

Ditto ditto . In Nagri

Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874	In Urdu	3p.	(1a.)
Ditto ditto	In Nagri.	3p.	(1a.)
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904	In Urdu.	3p.	(1a.)
Ditto ditto	In Nagri.	3p	(1a.)
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903	In Urdu.	Re. 1-5.	(5a.)
Ditto ditto	In Nagri.	Re. 1-5	(5a.)
Act V of 1861 (Police), as modified up to 7th March 1903	In Urdu	2a 9p	(1a.)
Ditto ditto	In Nagri	2a. 9p.	(1a.)
Act XVI of 1861 (Stage carriages) as modified up to 1st February 1898	In Urdu	1a 3p.	(1a.)
Ditto ditto	In Nagri.	1a. 3p.	(1a.)
Act XVI of 1863 (Excise), as modified up to 1st October 1909	In Urdu.	3p	(1a.)
Ditto ditto	In Nagri.	3p	(1a.)
Act XXXI of 1863 (Official Gazettes), with footnotes	In Urdu.	3p.	(1a.)
Ditto ditto	In Nagri.	3p.	(1a.)
Act III of 1864 (Foreigners), as modified up to 1st September 1900	In Urdu	1a.	(1a.)
Ditto ditto	In Nagri	1a	(1a.)
Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909	In Urdu.	3p.	(1a.)
Ditto ditto	In Nagri.	3p.	(1a.)
Act III of 1865 (Carriers), as modified up to 31st May 1903	In Urdu	9p.	(1a.)
Ditto ditto	In Nagri	9p	(1a.)
Act X of 1865 (Indian Succession) as modified up to 1st April 1909	In Urdu.	11a. 3p.	(2a.)
Ditto ditto	In Nagri.	11a. 3p.	(2a.)
Act III of 1867 (Public Gambling) as modified up to 1st December 1896	In Nagri	1a. 3p.	(1a.)
Act III of 1867 (Public Gambling) as modified up to 1st January 1905	In Urdu	1a.	(1a.)
Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908	In Urdu	6p	(1a.)
Ditto ditto	In Nagri.	6p.	(1a.)
Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907	In Urdu	1a 3p.	(1a.)
Ditto ditto	In Nagri	1a 3p.	(1a.)
Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908	In Nagri	3p	(1a.)
Act VII of 1870 (Court-fees), as modified up to 1st February 1909	In Urdu.	5a. 9p.	(1a.)
Ditto ditto	In Nagri.	5a. 6p.	(1a.)
Act I of 1871 (Cattle trespass), as modified up to 1st May 1910	In Urdu	1a. 9p.	(1a.)
Ditto ditto	In Nagri	1a. 9p	(1a.)
Act XXIII of 1871 (Pensions) as modified up to 1st September 1909	In Urdu.	9p.	(1a.)
Ditto ditto	In Nagri	9p.	(1a.)
Act I of 1872 (Indian Evidence), as modified up to 1st May 1908	In Urdu	8a	(2a.)
Ditto ditto	In Nagri.	8a.	(2a.)
Act IV of 1872 (Punjab Laws) as modified up to 1st November 1904	In Urdu.	2a 6p.	(1a. 6p.)
Act IX of 1872 (Indian Contract) as modified up to 1st February 1908	In Urdu	9a 9p.	(3a.)
Ditto ditto	In Nagri.	9a 9p	(3a.)
Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904	In Urdu	3a	(9p.)
Ditto ditto	In Nagri.	4a	(2a.)
Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903	In Urdu.	9p	(1a.)
Ditto ditto	In Nagri.	9p.	(1a.)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899	In Urdu.	3a 3p.	(1a.)
Ditto ditto	In Nagri.	3a. 3p.	(1a.)
Act X of 1873 (Indian Oaths) as modified up to 1st February 1903	In Urdu.	1a.	(1a.)
Ditto ditto	In Nagri	9p.	(1a.)

Act XVI of [illegible] .. .. In Urdu 1a (1a)
Act IX of [illegible] . .. In Urdu 2a (1a)
Act IX of [illegible] as modified up to 1st May 1907 .. In Urdu 9p (1a)
Ditto ditto .. In Nagri 9p (1a)
Act XI of [illegible] as modified up to 1st March 1907 .. In Urdu 2a 9p (1a 6p)
Ditto ditto .. In Nagri 2a 6p (1a 6p)
Act XVIII of [illegible] (Oudh Laws) .. .. .. In Urdu 2a (1a)
Act I of [illegible] as modified up to 1st February 1901 .. In Urdu 4a 0p (1a 6p)
Ditto ditto .. In Nagri 4a 6p (1a 6p)
Act I of [illegible] as modified up to 1st [illegible] 1907 .. .. In Urdu 1a. 6p (1a)
Ditto ditto .. In Nagri 1a 6p (1a)
Act VII of 1878 [illegible] as modified up to 1st December 1901 .. In Urdu 4a (1a 6p)
Ditto ditto .. In Nagri 4a. (1a. 6p)
Act XI of 1878 (Indian Arms) as modified up to 1st May 1904 .. In Urdu 2a (1a)
Ditto ditto .. In Nagri 2a (1a)
Act XVII of 1878 (Northern India [illegible]) as modified up to 1st June 1902 In Urdu 2a. (1a)
Ditto ditto .. In Nagri 2a. (1a)
Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May 1907 .. In Urdu 2a 6p. (1a.)
Ditto ditto .. In Nagri 2a. 0p (1a)
Act XII of 1880 [illegible] .. .. .. In Urdu 3p (1a)
Act XIII of 1880 (Vaccination) .. .. .. In Urdu 1a 3p (1a.)
Ditto ditto .. In Nagri 1a 3p. (1a.)
Act V of 1881 (Probate and Administration), as modified up to 1st July 1910 .. .. In Urdu 4a 6p (1a 6p)
Ditto ditto .. In Nagri 4a 6p (1a 6p.)
Act XVIII of 1881 (Central Provinces Land Revenue) as modified up to 1st November 1908 .. .. In Urdu 9a (1a. 6p)
Ditto ditto .. In Nagri 9a (1a. 6p)
Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st September 1907 .. . . In Urdu 4a (1a)
Ditto ditto .. In Nagri 4a (1a)
Act II of 1882 (Indian Trusts) as modified up to 1st June 1909 .. In Nagri 3a 6p (1a.)
Act IV of 1882 (Transfer of Property) as modified up to 1st March 1909 .. In Urdu 6a 9p (2a)
Ditto ditto .. In Nagri 6a 9p (2a.)
Act XIX of 1883 (Land Improvement Loans) as modified up to 1st September 1907 .. .. In Urdu 1a (1a)
Ditto ditto .. In Nagri 1a (1a)
Act IV of 1884 (Indian Explosives) as modified up to 1st September 1909 In Urdu 1a 3p (1a)
Ditto ditto .. In Nagri 1a 3p (1a)
Act VI of 1884 (Inland Steam Vessels) as modified up to 1st July 1891 .. In Urdu 3a 0p (1a 6p)
Ditto ditto .. In Nagri 3a 6p (1a 6p)
Act XII of 1884 (Agriculturists' Loans) as modified up to 1st September 1909 .. .. In Urdu 6p (1a)
Ditto ditto .. In Nagri 6p (1a)
Act XVIII of 1884 (Punjab Courts) as modified up to 1st December 1899 In Urdu 2a 6p (1a
Act II of 1885 [Negotiable Instruments (Amendment)] .. .. In Urdu 9p (1a)
Act III of 1885 [Transfer of Property (Amendment)] .. .. In Urdu 3p (1a)
Act X of 1885 [Oudh Estates (Amendment)] .. .. .. In Urdu 3p (1a)
Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910 .. In Urdu 1a 9p (1a)
Act XXI of 1885 [Madras Civil Courts (Amendment)] .. .. In Urdu 3p (1a)
Act II of 1886 (Indian Income tax) as modified up to 1st April 1907 .. In Urdu. 3a. (1a. 9p)
Ditto ditto .. In Nagri 3a (1a 9p)
Act IV of 1886 [Indian Contract (Amendment)] . .. .. In U 3p (1
Act VI of 1886 (Births, Deaths and Marriages Registration .. .. In 3p
Act X of 1886 [Indian Criminal Law (Amendment)] .. .. p

Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900	In Urdu	3a 3p	(1a)
Ditto ditto	In Nagri.	3a 3p	(1a.)
Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891	In Urdu	9p	(1a)
Ditto ditto ..	In Nagri	9p	(1a)
Act VII of 1887 (Suits' Valuation)	In Urdu.	9p	(1a)
Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896	In Urdu	2a 3p	(1a)
Ditto ditto ..	In Nagri	2a. 6p	(1a.)
Act X of 1887 (Native Passenger Ships)	In Urdu.	1a 6p	(1a)
Act XII of 1887 (Bengal, Agra and Assam Civil Courts)	In Urdu	1a. 3p	(1a.)
Ditto ditto ..	In Nagri	1a 3p	(1a)
Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899	In Urdu.	3a. 6p	(1a.)
Ditto ditto ..	In Nagri	3a 9p	(1a)
Act XV of 1887 (Burma Military Police)	In Urdu	9p	(1a.)
Ditto ditto ...	In Nagri	9p	(1a.)
Act XVIII of 1887 (Allahabad University)	In Urdu	1a	(1a.)
Act III of 1888 (Police), as modified up to 1st January 1909	In Urdu	3p	(1a)
Ditto ditto ..	In Nagri.	6p	(1a)
Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893	In Urdu	3p	(1a)
Ditto (as passed) ..	In Nagri	3p	(1a)
Act I of 1889 (Metal Tokens), as modified up to 1st April 1904 ..	In Urdu	6p	(1a)
Ditto ditto ..	In Nagri	6p.	(1a)
Act II of 1889 (Measures of Length)	In Urdu	3p	(1a)
Ditto ditto ..	In Nagri	3p	(1a)
Act IV of 1889 (Indian Merchandise Marks) as modified up to 1st February 1904	In Urdu	1a 9p	(1a)
Ditto ditto ..	In Nagri	2a	(1a.)
Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909	In Urdu	6p	(1a)
Ditto ditto ..	In Nagri	6p	(1a.)
Act VII of 1889 (Succession Certificate) as modified up to 1st December 1903	In Urdu	1a 9p	(1a)
Act XV of 1889 (Indian Official Secrets) as modified up to 1st April 1904	In Urdu	9p	(1a)
Ditto ditto ..	In Nagri	9p	(1a)
Act XVI of 1889 (Central Provinces Land Revenue)	In Urdu	1a 6p	(1a.)
Ditto ditto ..	In Nagri	1a 6p	(1a)
Act XX of 1889 [(Indian Lunatic Asylums (Amendment)]	In Urdu	3p	(1a)
Act I of 1890 (Revenue Recovery)	In Urdu	3p	(1a)
Act II of 1890 (Probate and Administration)	In Urdu	3p	(1a.)
Act V of 1890 (Forest)	In Urdu	6p	(1a)
Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908	In Urdu	6p	(1a)
Ditto ditto ..	In Nagri	9p	(1a)
Act VIII of 1890 (Guardians and Wards)	In Urdu	2a 3p	(1a 9p)
Act IX of 1890 (Indian Railways), as modified up to 1st June 1905 ..	In Urdu	8a	(2a)
Ditto as modified up to 1st May 1896 ..	In Nagri	8a	(2a)
Act X of 1890 [Press and Registration of Books (Amendment)] ..	In Urdu	3p	(1a)
Act XI of 1890 (Prevention of Cruelty to Animals)	In Urdu	6p	(1a)
Act XX of 1890 (United Provinces)	In Urdu	1a	(1a)
Act X of 1891 [Indian Criminal Law (Amendment)]	In Urdu	3p	(1a)
Act XIV of 1891 (Oudh Courts) .. .	In Urdu	6p	(1a)
Act XVIII of 1891 (Bankers' Books Evidence) as modified by Acts I of 1893 and XII of 1900	In Urdu	3p	(1a.)
Ditto ditto ..	In Nagri	6p.	(1a)

Act II of 19[illegible] ([illegible])	..	In Urdu.	3p (1a.)
Act IV of 19[illegible] (Local Court of Wards (Amendment))	..	In Urdu	6p (1a)
Act IV of [illegible] (Pa[illegible])	..	In Urdu	3p (1a.)
Act I of 1894 (Land Acquisition)	..	In Urdu	2a 9p (1a 6p)
Ditto ditto	..	In Nagri	1a 6p (1a. 6p)
Act III of 1894 (Indian Criminal Law (Amendment))	..	In Urdu	3p (1a.)
Act VIII of 1894 (Indian Tariff) as modified up to 1st October 1903	..	In Urdu	4a (1a.)
Ditto ditto	.	In Nagri	(3a. 9p) (3a)
Act IX of 1894 (Prisons)	..	In Urdu	2a. 9p. (1a.)
Ditto ditto	..	In Nagri	2a 3p (1a.)
Act VII of 1895 (Punjab Laws Act (Amendment))	..	*In Urdu.*	*3p (1a.)*
Ditto ditto	..	In Nagri	3p (1a.)
Act XIV of 1895 (Pilgrim Ships)	..	In Urdu	1a. 8p. (1a.)
Act II of 1896 (Cotton Duties)	..	In Urdu	1a 3p (1a)
Ditto ditto	..	In Nagri	1a. (1a.)
Act VI of 1896 (Indian Penal Code (Amendment))	..	In Urdu	3p (1a.)
Act VIII of 1896 (Inland Bonded Warehouses)	..	In Urdu	3p (1a.)
Ditto ditto	..	In Nagri	3p (1a)
Act XII of 1896 (Excise), as modified up to 1st March 1907	..	In Urdu	2a 9p (2a)
Ditto ditto	..	In Nagri	2a. 9p (2a.)
Act I of 1897 (Public Servants (Inquiries) Amendment)	..	In Urdu.	3p (1a)
Ditto ditto	..	In Nagri	3p (1a)
Act III of 1897 (Epidemic Diseases)	..	In Urdu	3p (1a.)
Ditto ditto	..	In Nagri	3p (1a)
Act IV of 1897 (Fisheries)	..	In Urdu	3p (1a.)
Ditto ditto	..	In Nagri	3p (1a.)
Act VI of 1897 (Negotiable Instruments (Amendment))	..	In Urdu	3p (1a)
Ditto ditto	..	In Nagri	3p (1a)
Act VIII of 1897 (Reformatory Schools)		In Urdu	1a. 3p (1a)
Ditto ditto	..	In Nagri	6p (1a)
Act IX of 1897 (Provident Funds) as modified up to 1st April 1903	..	In Urdu	9p. (1a.)
Ditto ditto	..	In Nagri	9p (1a.)
Act X of 1897 (General Clauses)	..	In Urdu	1a. (1a)
Ditto ditto	..	In Nagri.	1a (1a)
Act I of 1898 (Stage-carriages Act (1861) Amendment)	..	In Urdu	3p (1a)
Ditto ditto	..	In Nagri	3p (1a)
Act III of 1898 (Lepers) as modified up to 1st September 1909	..	In Urdu	6p (1a)
Ditto ditto	..	*In Nagri*	*6p (1a)*
Act IV of 1898 (Indian Penal Code (Amendment))	.	In Urdu	3p (1a.)
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909	..	In Urdu	Rs 1-4 (8a.)
Ditto ditto	..	In Nagri	Rs 1-0 (8a)
Act VI of 1898 (Indian Post Office)	..	In Urdu	3a 3p (1a)
Ditto ditto	..	In Nagri	3a 3p (1a.)
Act IX of 1898 (Livestock Importation)	..	In Urdu	3p (1a)
Ditto	..	In Nagri	3p (1a)
Act X of 1898 (Indian Insolvency Rules)	.	In Urdu	3p (1a)
Act I of 1899 (Indian Marine Act (1887) Amendment)	..	In Urdu	6p (1a)
Ditto ditto	..	In Nagri	6p (1a)
Act II of 1899 (Stamps) as modified up to 1st March 1907	..	In Urdu	7a 6p (1a 6p)
Ditto ditto	..	In Nagri	7a 6p (1a 6p)
Act IV of 1899 (Government Buildings)	..	In Urdu	3p (1a)
Ditto	..	In Nagri	3p (1a)
Act VII of 1899 (Indian Steam-vessels Act (1884) Amendment)	..	In Urdu	3p (1a
Ditto ditto	..	In Nagri.	3p.

Act VIII of 1899 (Indian Petroleum) as modified up to 1st January 1909	In Urdu	1a 6p	(1a.)
Ditto ditto	In Nagri.	1a 6p	(1a.)
Act IX of 1899 (Indian Arbitration)	In Urdu	9p	(1a)
Ditto	In Nagri.	9p	(1a)
Act XI of 1899 [Court fees (Amendment)]	In Urdu.	6p	(1a)
Ditto	In Nagri	6p.	(1a)
Act XII of 1899 (Currency Notes Forgery)	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a)
Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February 1908	In Urdu	9p	(1a)
Ditto ditto	In Nagri	9p	(1a.)
Act XIV of 1899 [Tariff (Amendment)]	In Urdu.	3p	(1a)
Ditto	In Nagri	3p	(1a.)
Act XVIII of 1899 [Land Improvement Loans (Amendment)]	In Urdu.	3p	(1a.)
Ditto ditto	In Nagri	3p	(1a.)
Act XX of 1899 (Presidency Banks)	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act XXI of 1899 [Central Provinces Tenancy (Amendment)]	In Urdu	3p	(1a)
Ditto ditto	In Nagri	3p	(1a)
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu	1a 3p	(1a)
Ditto ditto	In Nagri	1a 3p	(1a)
Act III of 1900 (Prisoners), as modified up to 1st March 1905	In Urdu	2a 3p	(1a.)
Ditto ditto	In Nagri	2a 3p	(1a)
Act IX of 1900 [Court fees (Amendment)]	In Urdu	3p	(1a)
Ditto	In Nagri	3p	(1a)
Act II of 1901 [Indian Tolls (Army)]	In Urdu	6p	(1a)
Ditto	In Nagri	9p	(1a.)
Act V of 1901 [Indian Forest (Amendment)]	In Urdu	3p	(1a)
Ditto	In Nagri	3p.	(1a)
Act VI of 1901 (Assam Labour and Emigration)	In Urdu	5a	(2a)
Ditto	In Nagri	5a	(2a.)
Act VII of 1901 (Native Christian Administration of Estates)	In Urdu	3p	(1a.)
Ditto ditto	In Nagri	3p	(1a)
Act VIII of 1901 (Indian Mines)	In Urdu	1a.	(1a.)
Ditto	In Nagri	1a	(1a)
Act X of 1901 [Court fees (Amendment)]	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a)
Act II of 1902 [Cantonments (House Accommodation)]	In Urdu	1a	(1a)
Ditto ditto	In Nagri	1a	(1a)
Act IV of 1902 (Indian Tramways)	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a)
Act VII of 1902 [United Provinces (Designation)]	In Urdu	3p	(1a)
Act VIII of 1902 [Indian Tariff (Amendment)]	In Urdu	3p	(1a)
Ditto	In Nagri	3p	(1a)
[illegible] [Indian Post Office (Amendment)]	In Urdu	3p	(1a)
[illegible]tto	In Nagri	3p	(1a)
[illegible] Works of Defence)	In Urdu	1a 3p	(1a)
[illegible]	In Nagri	1a 3p	(1a)
[illegible] ministration)	In Urdu	3p	(1a)
[illegible]	In Nagri	3p	(1a)
[illegible]	In Urdu	3p	(1a)
[illegible]	In Nagri	3p	1a.)
[illegible]	In Urdu	3p	(1a)
[illegible]	In Nagri	3p.	(1a)
[illegible]	In Urdu	3p	(1a)

Act XIII of 1903 [Lepers (Amendment)]	In Nagri	3p	(1a.)
Act XIV of 1903 (Indian Foreign Marriages)	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act XV of 1903 (Indian Extradition,) as modified up to 1st December 1904	In Urdu	1a 9p	(1a.)
Ditto ditto	In Nagri	1a. 9p	(1a.)
Act I of 1904 (Poisons)	In Urdu	6p.	(1a.)
Ditto	In Nagri	6p	(1a.)
Act IV of 1904 (North West Border Military Police)	In Urdu	9p	(1a.)
Act VI of 1904 [Transfer of Property (Amendment)]	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
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Ditto	In Nagri	9p	(1a.)
Act VIII of 1904 (Indian Universities)	In Urdu	1a 3p.	(1a.)
Ditto	In Nagri	1a. 3p	(1a.)
Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act, 1894)	In Urdu	3p	(1a.)
Ditto ditto	In Nagri	3p	(1a.)
Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act IV of 1905 (Indian Railway Board)	In Urdu	3p	(1a.)
Act VI of 1905 [Court fees (Amendment)]	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act III of 1906 (Indian Coinage)	In Urdu.	9p	(1a.)
Ditto	In Nagri	9p	(1a.)
Act V of 1906 [Indian Stamp (Amendment)]	In Urdu	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act III of 1907 (Provincial Insolvency)	In Urdu	1a 6p	(1a.)
Ditto	In Nagri	1a 6p	(1a.)
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Act I of 1908 [Legal Practitioners (Amendment)]	In Urdu.	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act III of 1908 [Indian Trusts (Amendment)]	In Urdu.	3p	(1a.)
Act V of 1908 (Code of Civil Procedure)	In Urdu.	Re. 1 2.	(6a.)
Ditto	In Nagri.	Re. 1 2.	(6a.)
Act VI of 1908 (Explosive Substances)	In Urdu.	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act VII of 1908 (Incitements to Offences)	In Urdu.	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
Act IX of 1908 (Indian Limitation)	In Urdu.	2a.	(1a.)
Ditto	In Nagri	2a.	(1a.)
Act X of 1908 (Indian Salt Duties)	In Urdu.	3p	(1a.)
Ditto	In Nagri.	3p.	(1a.)
Act XI of 1908 (Assam Labour and Emigration)	In Urdu.	3p	(1a.)
Ditto	In Nagri.	3p.	(1a.)
Act XIV of 1908 [Indian Criminal Law (Amendment)]	In Urdu.	3p	(1a.)
Ditto	In Nagri	3p	(1a.)
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Ditto	In Nagri.	2a.	(2a.)
Act XVII of 1908 (Indian Emigration)	In Urdu	2a. 3p	(2a.)
Ditto	In Nagri.	2a. 3p	(2a.)
Act I of 1909 [Indian Steamships Law (Amendment)]	In Urdu.	3p.	(1a.)
Ditto	In Nagri.	3p.	(1a.)
Act IV of 1909 (Whipping)	In Urdu.	3p.	(1a.)
Ditto	In Nagri.	3p.	(1a.)

Act V of 1909 [Amending (Army) Act] ..	In Urdu	3p (1a.)
Ditto ..	In Nagri	3p (1a)
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Ditto ..	In Nagri	3p (1a)
Act I of 1910 (Indian Press) ..	In Urdu	6p (1a)
Ditto ..	In Nagri	6p. (1a.)
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Ditto ..	In Nagri	6p (1a)
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Ditto ..	In Nagri	3p (1a)
Act V of 1910 (Dourin) ..	In Urdu	3p (1a)
Ditto ..	In Nagri	3p (1a.)
Act VI of 1910 [Indian Stamp (Amendment)] ..	In Urdu	3p (1a)
Ditto ..	In Nagri	3p (1a.)
Act VII of 1910 [Court Fees (Amendment)] ..	In Urdu	3p (1a.)
Ditto ..	In Nagri	3p (1a)
Act VIII of 1910 [Indian Tariff (Amendment)] ..	In Urdu	3p (1a)
Ditto ..	In Nagri	3p (1a)
Act IX of 1910 (Indian Electricity) ..	In Urdu	1a 9p (1a
Ditto ..	In Nagri	1a 9p (1a
Act XII of 1910 [Glanders and Farcy (Amendment)] ..	In Urdu	3p (1a)
Ditto ditto ..	In Nagri	3p (1a)
Act XIII of 1910 [Prisons (Amendment)] ..	In Urdu	3p (1a)
Ditto ..	In Nagri	3p (1a)
Act XIV of 1910 [Indian Emigration (Amendment)] ..	In Urdu	3p (1a)
Ditto ditto ..	In Nagri	3p (1a)
Act XV of 1910 (Cantonments) ..	In Urdu	9p. (1a.)
Ditto ..	In Nagri	9p. (1a)
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Ditto ..	In Nagri	3p (1a)
Regulation V of 1890 (British Baluchistan Forests)	In Urdu	2a (1a 6p
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JUDGES OF THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES.

1914

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THE HON'BLE SIR HENRY GEORGE RICHARDS, KT, K C.

PUISNE JUDGES

THE HON'BLE JUSTICE SIR GEORGE EDWARD KNOX, KT.

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,,		SIR HENRY DALY GRIFFIN, KT	*(On deputation from 5th April 1913 : retired from 4th June, 1914)*
,,		MR JUSTICE W TUDBALL	
,,	,,	E M DES C CHAMIER .	*(On leave from 20th March, 1913 to 28th February, 1914)*
,,	,,	SAIYID MUHAMMAD RAFIQ	
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,,	,,	SUNDAR LAL, LL D, C I.E . .	*(Officiated from 10th June to 18th July)*

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——1882 VI (INDIAN COMPANIES ACT), SECTIONS 76 AND 77—*Articles of association—Agent—Borrowing powers—Act No. IX of* 1872 (*Indian Contract Act*), *section* 237—*Estoppel*] The agents of a joint stock

The company had no valid articles of association, and neither the memorandum of association nor table A of the Indian Companies Act, 1882, empowered the agents to borrow money. There were, which, though e treated by the ie genuine and These articles

Held that the signature of the managing member of the agent firm was sufficient, and that although the articles of association were not valid, yet the company was in the circumstances estopped from raising the plea of their invalidity against holders in due course of these hundis

Kunj Kishore *v* The Official Liquidator, Shri Baldeo Mills, Ld. 416

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—— [illegible]

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—— SECTIONS 16 AND 88—*Certificate of succession—Suit to set aside certificate and decree passed in favour of the holder.*] A succession certificate granted under the provisions of the [illegible]

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I. L. R., 31 All., 9, *Sheopher Singh* v *Deonarain Singh* 10 A L J, 413, *Purshottam* v *Parmanand* Misc No 279 of 1908, and *Skinner* v *Shankar Lal*, S A No 263 of 1907, referred to.

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to the mortgagor
1, distinguished. *I*
and *Aimadar Man*
referred to

Raj Nath *v* Narain Das 567

——————SCHEDULE I, ARTICLE 182—*Execution of decree—' Step in aid of execution''—Substituted* *Held* that an appl cat on by a decree holder seeking to
on the judgement debtor
of execution within the
schedule to the Indian
Limitation Act 1908 *Pitam Singh* v *Tola Singh*, I L R, 29 All, 301 referred to

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——————ARTICLE 182,

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——1908 XVI—(INDIAN REGISTRATION ACT) SECTIONS 17 AND 90—*Regi tra ion—Act No IV of 1882 (Tran fer of P operty Act) section 107—Act No XV of 1895 (Crown Grants Act), sections 2 and 3—Lease—Lease of Government land by commissioners of a notified*
certain plots of land
had been handed
leases ran in the
provided that the
lessees were to remain in possession for 30 years so long as they ful filled certain conditions and the lessor had a right of re entry only on breach of certain conditions
registrable and could
ew of section 90 *(d)* of
were they excluded from
by the operation of the
Khan v *the Bank of Upper India* 3 A L J, 129 and 628, referred to

Munshi Lal *v* The Notified Area of Baraut .. 176

——(LOCAL)—1899—III (UNITED PROVINCES COURT OF WARDS ACT), SECTION 48—*Notice of suit—" P operty of any ward"—Property*
ward] *Held* that the
section 48 of the United
does not include property
by a ward No notice is
person claiming title to

Lal Singh *v* The Collector of Etah 831

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for one of the reasons given in the schedule itself and that allegations of corruption against the arbitrator should be dealt with under paragraph 15 after the award has been received

Even if a civil court possesses inherent jurisdiction to supersede an arbitration proceeding under its orders such jurisdiction should be cautiously and sparingly exercised and an application invoking such jurisdiction should at least suggest grounds for supposing that [illegible]

[illegible]

Page

continued in possession of the village down to 1871, when the Government granted her a proprietary interest in it, which she subsequently sold,

Held, on suit for possession after the death of the widow and her daughter by a person claiming as reversioner to the original lessee that the estate which the widow acquired in 1871 as the grantee of the Government was her own personal estate and not merely an enlargement of the leasehold estate of her husband, and that the plaintiff had consequently no right to succeed

LEASE—*Unexpired term of lease bequeathed to widow—Widow holding over on expiry of lease—Grant by Government to widow of property the subject of the lease—Nature of estate taken by widow*] A lease of a village in Kumaun was granted by the Government in 1844 for a period of twenty years The lessee died in 1852 having left his interest in the village (without clearly specifying what it amounted to) to his widow for life and after her to her daughter for life with a reversion in favour of a cretain temple The widow, however continued in possession of the village down to 1871, when the Government granted her a proprietary interest in it, which she subsequently sold.

Held, on suit for possession after the death of the widow and her daughter by a person claim ng as reversioner to the original lessee that the estate which the widow acquired in 1871 as the grantee of the Government was her own personal estate and not merely an enlargement of the leasehold estate of her husband, and that the plaintiff had con equently no right to succeed

Raj Kishore Das v Jaint Singh 387

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There is no absolute rule that a deed executed by a *pardanashin* lady cannot stand unless it is proved that she had independent advice The possess on or absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whol circumstances r l vant to the issue of whether the grantor of her own free will review of the facts and the training and ximate circumstan s reached that the obtaining of independent adv ce would not really have made any difference in the result then the deed ought to stand

In a suit for cancellation of gift executed by a *pardanashin* lady

there was no question of her being impoverished by g ving it No undue influence was affirmatively proved It appeared in evidence that the lady was strong m nded and had been n the habit for many years of manag ng her affairs, of entering up her accounts *and of attending to busin ss matters*

it, and that had independent advice been obta ned the lady would have acted just as she did *Mahomed Bakhsh Khan* v *Hossein Bibi* I L R 15 Calc, 684 L R 25 I A 81, referred to

Kali Bakhsh Singh *v* Ram Gopal Singh 81

WILL—*Construction of codicil—Bequest creating a succession of life in*

pur, who was a Hindu of the Chattri caste, by which he purported

respondent was
with whom he
g to the strict
um married to
B in 1699 the
first respondent obtained *possession of the property in suit*, and the appellant sued for it, the question being whether the appellant was an "issue" of *J B* within the meaning of the word "*aulad*" as used in the codicil and as such entitled to inherit *J B*'s property The first respondent contended that the appellant being illegitimate could not take under the terms of the codicil, that *J B* had been a

locum tenens of the *gaddinashin* for the time being and that amount shall be paid to *J B* and his issue (*aulad*) for generation after generation so long as the family (*khandan*) of *J B* and his issue (*aulad*) remain in existence (3) for his life time *J B* has a right to spend their money, but after his death from

Held (upholding the decision) that the case was not one where a gift is made by will of the corpus of a fund or a life interest in a

THE
INDIAN LAW REPORTS,
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REVISIONAL CRIMINAL

Before Mr Justice Ryves

EMPEROR *v* NAZIR KHAN*

1913
September 24

Act No XLV of 1860 (Indian Penal Code) section 498—Enticing away a married woman—Quantum of evidence necessary to prove the marriage

The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts but it is not necessary that they should be proved in any particular way

Queen Empress v *Subbarayan* (1), *Empress* v *Pitambur Singh* (2), *Empress of India* v *Kallu* (3) *Queen Empress* v *Santok Singh* (4) and *Queen Empress* v *Dal Singh* (5) referred to

IN this case one Nazir Khan was convicted of an offence under section 498 of the Indian Penal Code and sentenced to four months' rigorous imprisonment He appealed to the Sessions Judge, by whom the appeal was dismissed and the conviction and sentence maintained He then applied in revision to the High Court, where the principal question raised was that the evidence tendered by the prosecution with that object was not sufficient to prove the marriage of the complainant with his alleged wife Musammat Sirtajan.

Mr *S M Ahmad Karim* for the applicant

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

RYVES, J —Nazir Khan was convicted of an offence under section 498 of the Indian Penal Code and sentenced to four months' rigorous imprisonment On appeal the conviction was

* Criminal Revision No 656 of 1913 from an order of E C Allen, Sessions Judge of Mainpuri dated the 14th of June, 1913

(1) (1885) I L R 9 Mad, 9 (3) (1882) I. L R, 5 All, 233
(2) (1879) I L R. 5 Calc, 566 (4) Weekly Notes 1898 p 186
(5) (1897) I L R 20 All, 166

1913

EMPEROR v NAZIR KHAN

maintained The application in revision to this Court is grounded on three main contentions

(1) Because the actual marriage of the complainant and the woman Sirtajan not being attempted to be strictly proved by evidence, the conviction under section 498 is illegal

(2) Because under the present section the marriage cannot be presumed from the mere fact of cohabitation

(3) Because in any case the woman having clearly stated that she had been divorced by Haidar Khan unless the contrary has been proved no conviction under the section can stand

My attention has been called to the following rulings in support of the first ground. *Empress* v *Pitambur Singh* (1) In that case Garth C J delivering the judgement of the Full Bench, said that " the fact of the marriage must be strictly proved in the regular way That ruling was followed by this Court in *Empress of India* v *Kallu* (2) in which the evidence to prove the marriage was set out and was held to be insufficient The next case referred to was *Queen Empress* v *Santok Singh* (3) In that case also the whole of the evidence with reference to the marriage is set out and there too it was held to be insufficient The next case cited was *Queen Empress* v *Dal Singh* (4) There a Division Bench of this Court held that, ' the court should require some better evidence of the marriage than the mere statement of the complainant and the woman '

What I think was meant in all these cases is that, as the fact and the legality of the marriage are material elements in a case under section 498 they must be proved as strictly as any other material facts as for instance the enticing away of a woman with the intention mentioned in the section. I do not think these rulings lay down that the fact of the marriage can be proved only in some particular way This case is much more like the case of *Queen Empress* v *Subbarayan* (5) and I entirely agree with the observations of the Judges who decided that case As pointed out in that case ' even a marriage in England may be proved by any person who was actually present and saw the ceremony performed,

(1) (1879) I L R 5 Calc, 566
(2) (1882) I L R 5 All. 233
(3) Weekly Notes, 1898 p 186
(4) (1897) I. L. R 20 All, 166
(5) (1885) I. L R. 9 Mad. 9

it is not necessary to prove its registration or the licence or publication of the banns " 1913

Emperor v. Nazir Khan

In the present case I find on going through the record that the complainant was not asked one word throughout a lengthy cross examination about his marriage with the woman Sirtajan

In the opening words of the judgement of the Magistrate it is stated —" It is common ground that Musammat Siratajan was the duly married wife of Haidar Khan ' Musammat Sirtajan was called, she deposed to her marriage to the complainant, and no question was asked her in cross examination It is true that she stated in a subsequent cross examination " when my husband turned me out, he told me—I divorce you, go out ' In re examination she said —" He told me this inside the house " Karim Bakhsh, the father of Musammat Sirtajan, was called, and he also proved the marriage, giving details The whole object of calling him was to prove the marriage, and no other question was put to him in examination in chief and he was not cross examined on the point Similarly Abdul Karim, the father of the complainant, was called and he also proved the marriage no question was put to him in cross-examination on the point Under these circumstances, I fail to see how the first ground can be supported There is unrebutted evidence in this case of the woman, the husband and their parents describing the marriage in detail I think, therefore, in this case the fact and legality of the marriage have been satisfactorily proved.

The second ground taken does not arise

The third ground I think really comes within the rule of the cases quoted by me, and the vague statement of the woman that she had been divorced, unsupported by any evidence, is quite in sufficient to establish the fact that she had been divorced No such suggestion was made during the cross examination of the prosecution witnesses it was only after the charge was framed and Musammat Sirtajan was called for further cross examination that she made this statement I may point out that these points were not taken in the court below In any event it seems to me that it has been abundantly and satisfactorily proved that Musammat Sirtajan was the wife of the complainant. The result is that I reject this application

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EMPEROR v. NAZIR KHAN.

It is not clear from these papers whether the applicant has served the four months' rigorous imprisonment to which he was sentenced. If he has not, he must surrender to his bail and serve out the unexpired portion of his sentence

Application dismissed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves

EMPEROR v SAILANI.*

1913 *October*, 22

Criminal Procedure Code, sections 403, 423, 439—Previous acquittal on charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under section 304 of the Indian Penal Code—Revision.

S and R were charged with causing simple hurt to K. The case was compounded and both the accused were acquitted K, later on, died of the injury caused by S and R The Magistrate, thereupon, sent up R for trial before the Sessions under section 304, but discharged S, as he found that the injury caused by him did not in any way contribute to K's death The Sessions Judge directed the Magistrate to commit S also, and he was committed accordingly. *Held* that there was no legal bar to the trial of S. under section 304 of the Indian Penal Code, and to his conviction under that section if the evidence enabled the court to apply either section 34 or 114 of the Indian Penal Code to the case A commitment can only be set aside on a point of law and as no such point arose in this case High Court did not interfere.

Two persons, Sailani and Ram Ghulam, were put on their trial for causing simple hurt to one Kesri. That case was compounded, and both the accused were acquitted Subsequently Kesri died, and on a post mortem examination it was discovered that his death was due to an injury which he received in the course of the assault referred to above. Thereupon both persons were *challaned* under section 304 of the Indian Penal Code for causing the death of Kesri. The Magistrate committed Ram Ghulam to take his trial under section 304, but held that the injury caused by Sailani to the back of the head of Kesri did not in any way contribute to his death and that he could only be considered guilty of causing simple hurt—of which he had already been acquitted. The Sessions Judge, however, directed that Sailani should also be committed to his court under section 304 Against this commitment Sailani applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant, submitted that inasmuch as the accused had been acquitted on certain facts of a charge of simple hurt an order for commitment for culpable

* Criminal Revision No 8?4 of 1913 from an order of F. S Tabor, Sessions Judge of Shahjahanpur, dated the 1st of September, 1913.

homicide not amounting to murder on the same facts was unsound and improper

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown, submitted that sections 423 and 439 of the Code of Criminal Procedure conferred on the High Court the power of ordering a re-trial The accused could be committed to the sessions for trial under section 304 Indian Penal Code inasmuch as sections 34 and 114 of the Code applied

BANERJI and RYVES JJ —Sailani and Ram Ghulam were originally put on their trial for causing simple hurt to one Kesri That case was compounded, and in consequence both the accused persons were acquitted. Subsequently Kesri died and a post mortem examination revealed the fact that his death was due to an injury which he received in the course of the assault made on him by Sailani and Ram Ghulam The police *challaned* both these persons under section 304 of the Indian Penal Code for causing the death of Kesri The Magistrate committed Ram Ghulam to take his trial under section 304 but held that the injury which was caused by Sailani to the back of the head of Kesri did not in any way contribute to his death and that at the utmost Sailani could only be convicted of causing simple hurt under section 323 of the Indian Penal Code As he had already been acquitted on that charge the learned Magistrate refused to commit him. The learned Sessions Judge on perusal of the record directed that Sailani also should be committed to the Sessions for trial under section 304 of the Indian Penal Code From that order this application for revision has been presented before us It appears to us that there is no legal bar to the trial of Sailani on a charge under section 304 Whether he can be convicted under that section will depend on the evidence in the case and if it is proved by that evidence that he is as much responsible for the death of Kesri as Ram Ghulam, that is to say, if the evidence enables the court to apply either section 34 or section 114 of the Indian Penal Code to the case That is purely a question of fact to be determined by the court at the trial A commitment can be set aside only on a point of law As no such point arises in this case, we are unable to set aside the order of commitment. The application is, accordingly, rejected

Application rejected

1913
October, 25

Before Mr Justice Muhammad Rafiq

EMPEROR *v* GOPAL SINGH AND ANOTHER *

Criminal Procedure Code section 54(1)—'Credible information'—Attempted arrest by police constable upon knowledge that a warrant of arrest for a cognizable offence was extant—Act No XLV of 1860 (Indian Penal Code), section 353

A police constable having knowledge that a warrant of arrest in respect of a cognizable offence was outstanding against a certain person attempted to arrest such person and in so doing was assaulted and prevented from effecting the arrest

Held that the existence of the warrant was equivalent to 'credible information" that the person in question had been concerned in a cognizable offence within the meaning of section 54 (1) of the Code of Criminal Procedure and that the persons preventing the arrest were properly convicted under section 353 of the Indian Penal Code *Queen Empress* v *Dalip* (1) distinguished

THE facts of this case were as follows —

One Raghunandan Singh was wanted on a charge of cheating by the Bombay Police and a warrant for his arrest was issued to the Sub Inspector, Baragaon, in whose circle the village of Raghunandan Singh was situate The Sub Inspector ordered his subordinate constables to be on the look out for Raghunandan Singh and to arrest him wherever found Sarju Singh constable, with a chaukidar, came across Raghunandan Singh and proceeded to arrest him, informing him at the same time that a warrant had been issued by the Bombay Police under which he (Raghunandan Singh) was wanted. Raghunandan Singh called for help when Sarju Singh attempted to arrest him. The two applicants came up, interfered with and assaulted Sarju Singh and the chaukidar, and managed to prevent the arrest of Raghunandan Singh. On the report of the constable both the applicants were sent up for trial on a charge under section 353 of the Indian Penal Code and were convicted They preferred an appeal to the Sessions Judge of Benares and their appeal was dismissed. They then applied in revision to the High Court.

Mr. *A H C Hamilton*, for the applicants

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown

* Criminal Revision No 940 of 1913, from an order of B J Dalal, Sessions Judge of Benares, dated the 6th of August 1913

(1) (1896) I L R., 18 All, 246.

1913

EMPEROR v. GOPAL SINGH

MUHAMMAD RAFIQ, J—The two applicants Gopal Singh and Sukhnandan Singh were convicted under section 353 of the Indian Penal Code of the offence of obstructing two public servants in the discharge of their duties The applicants challenge their conviction and deny their guilt It appears that one Raghunandan Singh was wanted on a charge of cheating by the Bombay Police and a warrant for his arrest was issued to the Sub-Inspector, Baragaon, in whose circle the village of Raghunandan Singh was situate The Sub-Inspector ordered his subordinate constables to be on the look out for Raghunandan Singh and to arrest him wherever found. Sarju Singh constable with a chaukidar, came across Raghunandan Singh and proceeded to arrest him, informing him at the same time that a warrant had been issued by the Bombay Police under which he (Raghunandan Singh) was wanted Raghunandan Singh called for help when Sarju Singh attempted to arrest him The two applicants came up interfered with and assaulted Sarju Singh and the chaukidar, and managed to prevent the arrest of Raghunandan Singh On the report of the constable both the applicants were sent up for trial on a charge under section 353 of the Indian Penal Code and were convicted They preferred an appeal to the Sessions Judge of Benares and their appeal was dismissed They have come up in revision to this Court It is contended on their behalf that the constable and the chaukidar were not doing their duty when attempting to arrest Raghunandan Singh because neither the constable nor the chaukidar had the warrant of arrest with him The ruling in *Queen Empress* v *Dalip* (1) was cited in support of this contention. The second contention is that the conviction under section 353 of the Indian Penal Code is not maintainable, inasmuch as the interference was made when the constable and the chaukidar were not occupied in the discharge of their duty Both contentions are in my opinion unsound. The second contention depends on the first Under section 54, clause (1), of the Code of Criminal Procedure every police officer is empowered to arrest, without a warrant, a person who has committed a cognizable offence on suspicion or credible information of the commission of the offence The constable had information of the offence

(1) (1896) I L R, 18 All., 246

1913

EMPEROR v. GOPAL SINGH.

committed by Raghunandan Singh through the warrant issued by the Bombay Police, and such information may well be described as credible information. The case relied on by the learned counsel for the applicants does not apply, as the offence in the case was not a cognizable offence. I think that the constable and the chaukidar were within their rights and were discharging their duty in their attempt to arrest Raghunandan Singh, and if in the discharge of their duties they were obstructed by the applicants, the offence of the latter falls under section 353 of the Indian Penal Code. The application fails and is rejected.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Piggott.

1913 *November, 7.*

MUL CHAND (PLAINTIFF) v. MURARI LAL AND OTHERS (DEFENDANTS).*

Act No III of 1907 (Provincial Insolvency Act), sections 20, 22, 46—Civil Procedure Code (1908), order XXI, rule 58—Insolvency—Property taken by receiver as property of insolvent—Objection by third party claiming to be owner—Procedure—Appeal

A receiver appointed under the Provincial Insolvency Act, 1907, took possession, at the instance of one of the creditors, of certain property which was believed to be that of the insolvent. A third party came into court and applied under order XXI, rule 58, of the Code of Civil Procedure claiming the property as his, and, when his application was rejected, appealed to the High Court.

Held that the applicant's proper remedy was under section 22 of the Provincial Insolvency Act, and that an appeal did not lie as of right, but only by leave of the District Court or of the High Court.

Quaere whether an Additional District Judge to whom a matter under the Provincial Insolvency Act had been made over by the District Judge was a "District Court" within the meaning of the Act?

IN this case two persons, Nathu Mal and Fakir Chand, had applied in the court of the District Judge of Meerut to be declared insolvents. The District Judge made over the proceeding for disposal to the Second Additional Judge, who proceeded to adjudicate the applicants insolvents and to appoint a receiver. The receiver, at the instance of one of the creditors, proceeded to annex certain movable property consisting of cash and cloth, as being that of the insolvents, acting in this respect under section 20 of the

* First Appeal No 115 of 1913 from an order of Mubarak Husain, Second Additional Judge of Meerut, dated the 14th of February, 1913.

Provincial Insolvency Act. One Mul Chand, who claimed the property as his own, presented to the Additional Judge an application under order XXI, rule 58, of Code of Civil Procedure, praying that the property might be delivered to him This application was rejected and he thereupon filed a regular appeal from order in the High Court

Dr *Surendra Nath Sen*, for the appellant

Munshi *Damodar Das* and Pandit *Uma Shankar Bajpai*, for the respondents

RYVES and PIGGOTT, JJ —This appeal arises out of certain proceedings the nature of which has to a certain extent been misconceived both by the courts below and by the appellant in filing this appeal.

We find that two persons, Nathu Mal and Fakir Chand, had applied in the court of the District Judge of Meerut to be declared insolvents That court made over the proceeding for disposal to the Second Additional Judge of Meerut, who proceeded to adjudicate Fakir Chand and Nathu Mal insolvents and to appoint a receiver on the 23rd of November, 1912 This receiver, on information laid by one of the creditors, seized certain movable property, i e some cash and a stock of cloth, as property of the insolvents in order to dispose of the same for the benefit of the creditors He was undoubtedly acting under the provisions of section 20 of the Provincial Insolvency Act (Act No III of 1907), and as a matter of fact in this particular matter he acted under the orders of the District Judge

Mul Chand, who is the appellant before us, claims that the property thus seized by the receiver is his own He presented, in the court below, what purports to be an objection under order XXI, rule 58, of the Code of Civil Procedure This has no application to the circumstances of the case Mul Chand's position was that of a person aggrieved by an act of the receiver and his remedy was by an application under section 22 of Act No III of 1907 His application was, however, dealt with by the Second Additional Judge of Meerut on the merits, and after taking evidence the learned Additional Judge came to the conclusion that the property seized was in fact that of the insolvents, and he dismissed Mul Chand's application accordingly

1913

MUL CHAND v. MURARI LAL.

The latter has now come before this Court in appeal. He still persists in treating the matter as an execution proceeding under the Code of Civil Procedure, for he has presented this appeal as a matter of right and without any reference to the provisions of sections 22 and 46 of the Provincial Insolvency Act on the subject of appeals. An examination of these sections, however, suggests two questions. One is whether the court of the Second Additional Judge of Meerut is or is not a "District Court" within the meaning of the definition in Act No. III of 1907. If it is *not*, then an appeal from the order complained of lay to the District Judge. We have not thought it necessary to go into this question, for the matter may be disposed of upon another ground. Even if we assume for the sake of argument that the court of the Second Additional Judge was a "District Court" under the Provincial Insolvency Act, an appeal would only lie from the order complained of by special leave of the District Court or of this Court. We have before us no formal application for leave to appeal. We have heard the appellant on the facts of the case, in order to see whether he could make out any sufficient cause for inducing us to allow him to amend his pleadings and bring the matter before us in regular form by an application for leave to appeal.

We are content to find that there is nothing in the circumstances of this case to suggest any reason why special leave should be given. A matter such as this is evidently one which the Legislature intended to leave to the discretion of the District Court. Under such circumstances, leave to appeal should only be granted in special cases, and we find nothing in the record before us to justify us in treating this as a special case.

In these circumstances, we dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1913
November, 7.

Before Justice Sir George Knox, Justice Sir Pramada Charan Banerji and Mr Justice Tudball.

MUTASADDI LAL (PETITIONER) *v* HARKESH AND OTHERS (OPPOSITE PARTIES.) *

Act No. II of 1899 (Indian Stamp Act), section 2 (14); schedule I, article 5— "Instrument"—Entry in register as to terms of hiring certain machinery attested by thumb marks of hirers—Memorandum of agreement—Stamp.

In a book kept by the owner of certain machinery for the manufacture of sugar which purported to be a register of sums payable with respect to the letting out of wooden machines (*charkhi*) and rollers for pressing sugarcane and iron pans for boiling sugarcane juice was an entry to the following effect—"Harkesh, son of Kunwar, and two others, residents of mauza Salempur, hired a sugarcane pressing machine in consideration of a rent of Rs 15, from the plaintiff through his *karinda* (named), that they would pay the hire in *Chait*, and in default would pay interest at 2 per cent per mensem." Below this entry were the thumb marks of the persons who hired the machine.

Held that this entry amounted to an "instrument" as defined in section 2, sub section (14) of the Indian Stamp Act, 1899, and was a memorandum of agreement within the terms of article 5 *(b)* of the first schedule to that Act. *Mulchand Lala* v. *Kashibullav Biswas* (1) referred to.

THIS was a suit for recovery of arrears of hire of a sugarcane pressing machine and two cane juice boiling pans, together with interest. It was based on entries in two registers of the plaintiff, which were recorded in the third person and were as follows. It was recorded that Harkesh, son of Kunwar, and two others, residents of Salempur, hired a sugarcane pressing machine (description and number given) in consideration of a rent of Rs. 15, from the plaintiff through his *karinda* (named), that they would pay the hire in *Chait*, and in default would pay interest at 2 per cent. per mensem. Below that entry appeared the thumb marks of the persons hiring the machine. In the case of the hiring of the pans, the language employed was similar, except that there was the further stipulation that the hirers would return the pans at their own cost The Munsif was of opinion that the entry was a memorandum of agreement and required to be stamped with an eight anna stamp; but referred the matter to the High Court under the provisions of section 60 of the Indian Stamp Act, 1899.

* Miscellaneous Civil No. 431 of 1913. Reference under section 60 of the Indian Stamp Act, 1899.

(1) (1907) I.L.R., 35 Calc., 111.

1913

MUTASADDI LAL v. HARKESH.

Mr. *Nihal Chand* (for the plaintiff), submitted that the entry was in the third person made by the agent of the firm for his master's information and not with a view to base any claim on it. The thumb impressions of the defendants below the entry were taken to prove the correctness of the entry. The entry might assist in proving the contract, but it was not an agreement. He referred to Donough's Stamp Act, p 211; *Carlill* v. *Carbolic Smoke Ball Company* (1), *Udit Upadhya* v. *Bhawani Din* (2) and *Dulmha Kunwar* v. *Mahadeo Prasad* (3). The sole test was whether a decree could be passed on this entry without any oral evidence being given of the contract entered into between the parties.

The Officiating Government Advocate (Mr. *W. Wallach*) for the Crown, submitted that in England all leases and agreements were written in the third person. The Munsif was right in holding that the document should not be disregarded, as it bore the thumb impression of the defendants, in spite of the fact that it was written in the third person. He referred to *Mulchand Lala* v. *Kashibullav Biswas* (4) and *Murari Mohun Roy*, v. *Khetter Nath Mullick* (5). In the case reported in 27 All., p. 84, the Judges did not consider what a memorandum of an agreement was.

KNOX, BANERJI and TUDBALL JJ:—This is a reference made under sub-section (1) of section 60 of Act No. II of 1899. The court making the reference is the Munsif of Deoband and the reference was made, as the law requires, through the District Judge of Saharanpur. The document to which the reference relates is a document contained in a book which purports to be a register of sums payable with respect to the letting out of wooden machines (*charkhi*) and rollers for pressing sugarcane and iron pans for boiling sugarcane juice. The documents in question are to be found as entries Nos 20 and 23 for the year 1909 in these registers. The entries are to the effect that "Harkesh, son of Kunwar, and two others, residents of mauza Salempur, hired a sugarcane pressing machine in consideration of a rent of Rs. 15, from the plaintiff through his *karinda* (named), that they would pay the hire in *Chait*, and in default would pay interest at 2 per cent. per mensem."

(1) (1892) I.L.R. 2 Q.B., 490.

(2) (1904) I.L.R., 27 All., 84.

(3) Weekly Notes, 1906, p. 80.

(4) (1907) I.L.R., 35 Calc., 111.

(5) (1887) I.L.R., 15 Calc., 150.

Below this entry appear the thumb marks of the persons who hired the machine. In one of the documents there is a further statement that the hirers would return the pans hired at their own cost After hearing the learned counsel on both sides and carefully considering the terms of the documents, we are satisfied that each of these documents is an "instrument" as defined in sub-section (14) of section 2 of Act No II of 1899, and that the contents of the documents fall within the terms of article 5 of schedule I of the said Act, being memoranda of agreements within the meaning of that article Under clause (b) of article 5, each of the documents therefore required a stamp of eight annas This case is similar to the case of *Mulchand Lala v Kashibullav Biswas* (1) This is our answer to the reference A copy of this will be sent under seal of the Court and bearing the signature of the Registrar to the Chief Controlling Revenue Authority and another copy to the Judge who made the reference

1913

MUTASADDI LAL v HARKESH

MISCELLANEOUS CRIMINAL

1913 *November* 12

Before Justice Sir George Knox

EMPEROR *v* MANGAL AND OTHERS*

Criminal Procedure Code sections 244 and 540—Right of accused to summon witnesses—Second application by accused to magistrate not seised of the case—Procedure—Affidavit

When an accused person has been called upon to make his defence and has applied for and obtained the summoning of witnesses on his behalf his only means of procuring the summoning of further witnesses is to ask the Court to take action under section 540 of the Code of Criminal Procedure

The accused has no right to put in a second application *simpliciter* for the summoning of more witnesses, nor has the Court any power to grant such an application, more particularly when such Court is a magistrate not seised of the case, to whom the application is made in the absence of the trying magistrate

Observations on the contents drafting and attestation of affidavits

THIS was an application for the transfer of a case under Act No III of 1907 pending against the applicant in the court of a Magistrate of Mirzapur district The facts upon which the application was based are set forth in detail in the order of the High Court

* Criminal Miscellaneous No. 223 of 1913

(1) (1907) I. L. R., 35 Calc., 111

1913

EMPEROR v. MANGAL.

Mr *A. P. Dube* and *Satya Chandra Mukerji*, for the applicants

The Officiating Government Advocate (Mr *W. Wallach*), for the Crown.

KNOX, J—This is an application presented on the part of Mangal Prasad and others The application is supported by an affidavit bearing date the 18th of October, 1913 That affidavit purports to be sworn by one Shambhu, son of Gopi, caste Brahmin, resident of Jangi Ghat in the City of Mirzapur The application prays (1) that the order of Mr L S White, dated the 1st of October, 1913 be set aside and the order of Babu Jwala Prasad, summoning the Line Inspector, Mr Firth, and the City Kotwal be restored, (2) that the District Magistrate of Mirzapur and the Superintendent of Police be ordered to be summoned, (3) that after passing these orders the case be transferred to some other competent Magistrate After hearing the learned counsel in support of the application I find from the record that this was a case falling under sections 3 and 4 of Act III of 1867 The accused were sent up by the police and placed before Mr L S White for trial on the 2nd of September, 1913 On that date the Magistrate examined all the witnesses for the prosecution and called upon the accused for their defence After the defence was taken, he adjourned the case to the 4th of October, 1913, and again to the 20th of October, 1913 There is another order of adjournment which need not be noticed. On the 26th of September, 1913, Mr. White was away from Mirzapur, and in his absence an application was put in on behalf of the accused praying that eighteen witnesses might be summoned as witnesses for the defence This application was placed before Mr Jwala Prasad. That officer, on what authority I know not and cannot discover, passed an order that these witnesses be summoned. Not being seised of the case himself, he had absolutely no power of any kind to pass an order in the case, especially an order of this description In this list of witnesses neither the Magistrate of Mirzapur nor the Superintendent of Police are named. The accused had, therefore, exhausted the power of summoning witnesses for the defence. All that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under the powers vested in the Magistrate

under section 540 of the Code of Criminal Procedure That an error was made by Babu Jwala Prasad in passing the order he did will be seen from this fact that Babu Jwala Prasad was never seised of the case and had no power to issue summonses for witnesses On the record there is no order of transfer giving Mr Jwala Prasad jurisdiction to pass such an order It will also be seen that Mr White was quite within his powers in refusing to summon the District Magistrate and the Superintendent of Police The orders then complained of are right and proper orders, and there exist no grounds of any kind justifying an order of transfer in this case This application is, therefore, dismissed But there remain still more serious acts on the part of Shambhu, whom I have already mentioned above Shambhu in his affidavit sets out that ' this case was originally heard and tried by Babu Jwala Prasad, Magis trate, first class, before whom four prosecution witnesses viz, Mr Firth Line Inspector, Police, City Kotwal Kalka Prasad, one Shahmir, and a man named Kaderi were examined and cursorily cross examined. I know this from my personal knowledge That the said Babu Jwala Prasad after the witnesses were so examined called the accused to enter upon their defence whereupon in view of the cursory cross examination of the witnesses, the accused put in an application that the witnesses be re summoned for further cross-examination, which the court in the interest of justice granted." The affidavit concludes — I solemnly affirm that this my declaration is true that it conceals nothing and that no part of it is false.' Let an order issue directing the District Magistrate of Mirzapur to serve a summons upon Shambhu, son of Gopi Nath, caste Brahman, resident of Jangi Ghat, City of Mirzapur, to appear in this Court on the 12th of November, 1913, to show cause why he should not be tried for swearing a false affidavit or why some other suitable order should not be passed

On cause being shown by the accused the Court delivered the following judgement

Shambhu, son of Gopi Nath, caste Brahman, resident of Jangi Ghat, City of Mirzapur, has appeared in this Court in obedience to the order issued upon him He says that in instructing the learned counsel who drew up the affidavit he made use of the words ' Joint Sahib ' and never made use of the words Babu

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Jwala Prasad. For the words which appeared in paragraph 8 of the affidavit he expresses regret and says that he had no intention to mislead the court. The explanation is a very lame one. Not only did he aver that the person who called the accused to enter upon their defence was Babu Jwala Prasad, and that he swore this of his own personal knowledge, but he appended an attestation clause which vouched for the truth of his declaration. To go further, when he came before the Commissioner he solemnly affirmed that this fact was true. It appears from that affidavit that the affidavit was read over and explained to him. It is difficult to understand how, if this procedure was duly carried out and the deponent paid attention to the words read over to him, he failed to notice that he was being made to swear to a fact which did not exist. I am afraid, however, that it may be the case that the care and precision with which affidavits are intended to be verified and sworn to by the persons who make them are not always observed by those who administer affidavits and those who prepare them. The intention of the law is, and it cannot be too often repeated, that an affidavit must contain nothing but bare facts known to the person who makes the affidavit, either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is possible for huamn beings to make a mistake in reciting a fact, the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct. In whatever haste Shambhu may have been, it is difficult to conceive that, if he intended to tell the truth, he would not not have noticed that the writer of the affidavit had led him, no doubt, unwittingly, into the making of a statement which he, Shambhu, knew to be false. For this reason I accept the apology which is made by him, and I hope after this that those who make affidavits, those who prepare affidavits, and those who are entrusted with the solemn duty of having affidavits sworn before them will take proper care to see that the provisions of the law are duly carried out. Carelessness on the part of any one of these three may place the deponent in a very serious position, and the apology which I accept on the present occasion must not be construed to be a precedent of this Court for

always accepting statements of this nature as sufficient to condone the making of a false statement I discharge Shambhu with this warning The contents of this warning will be duly and carefully explained to him.

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APPELLATE CIVIL

Before Mr Justice Ryves and Mr Justice Piggott

KAPILDEO AND ANOTHER (DEFENDANTS) v THAKUR PRASAD AND ANOTHER (PLAINTIFFS)*

1913 *November* 14

Hindu law—Joint Hindu family—Antecedent debt—Mortgage executed by father to complete purchase of immovable property at an execution sale but executed after expiry of time for paying in the balance of the price—Property nevertheless remaining with the purchaser

An auction purchaser of immovable property paid in the amount required by law as a preliminary deposit but being unable to find the remainder of the auction price borrowed it on the security of a mortgage comprising the property purchased at the auction sale and also some property of the joint family of which the auction purchaser was the head This mortgage was however, executed after the expiry of the time fixed by law for payment of the balance of the auction price The executing court refused to accept payment of the balance but the property remained with the purchaser apparently in virtue of some arrangement with the judgement debtor by whom ostensibly the decree was satisfied

Held that in the circumstances above described the mortgagee was entitled to recover on his mortgage and that the sons of the mortgagor could not be heard to plead that the mortgage money was not borrowed to pay an antecedent debt within the meaning of the Hindu law

THIS was a suit for sale on a mortgage executed in circumstances described at length in the judgement of the High Court by the father of the joint Hindu family The defendants were the sons of the mortgagor and pleaded that for various technical reasons they were not liable in respect of the mortgage debt

The court of first instance decreed the claim and this decree was confirmed on appeal The defendants thereupon appealed to the High Court

Dr *Satish Chandra Banerji*, for the appellants

Munshi *Gobind Prasad*, for the respondents

* Second Appeal No 1522 of 1912 from a decree of F D Simpson District Judge of Gorakhpur, dated the 30th of August 1912 confirming a decree of Hidayat Ali officiating Second Additional Subordinate Judge of Gorakhpur, dated the 12th of March 1912

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KALPIDEO v THAKUR PRASAD

RYVES and PIGGOTT, JJ —This is a second appeal in a mortgage suit by two defendants, who are the minor sons of the original mortgagor The last paragraph of the memorandum of appeal to this Court is apparently intended to attack the validity of the deed of transfer under which the plaintiffs are claiming, but it has not been pressed in argument and seems to have no force The one substantial question in issue is whether under the particular circumstances of this case the appellants are bound by the mortgage executed by their father Kali Dat Pande The latter had bid for certain immovable property at an auction sale, and had paid into court the preliminary deposit required by law In order to complete the transaction he executed a mortgage-deed, hypothecating both the property he proposed to acquire at the auction sale and other family property in his hands That is to say, Kali Dat Pande had entered into an engagement by which he bound himself under penalty to deposit in court a certain sum of money by a certain date In borrowing money in order to enable him to meet this engagement he was clearly discharging an "antecedent debt," and his sons cannot repudiate liability for a mortgage debt thus incurred. There happens however, to be in the present case one curious complication The auction sale had been held on the 21st of May, 1907, and the mortgage deed in suit was not executed until the 7th of June 1907 The period of fifteen days, allowed by law within which Kali Dat Pande was bound to complete the transaction had, therefore, expired. It is accordingly contended on behalf of the appellants that the liability which Kali Dat had incurred on the 21st of May 1907, was at an end, that the mortgagee should have been on his guard, and that if he had carefully examined the receipt for the preliminary deposit submitted by Kali Dat for his inspection, he would have seen that there was no longer any "antecedent debt' to satisfy and that the money advanced by him on the mortgage could no longer be applied to its ostensible purpose As regards the subsequent proceedings in connection with the auction sale, we know that the court concerned did in fact refuse to accept Kali Dat's tender of the balance of the purchase money, when this was made after the the expiration of the period prescribed by law We know a so that the property was not put up for sale a second time, as the decree was satisfied by payment into court of the full amount due,

ostensibly on behalf of the judgement-debtor yet the property in question must have been acquired by Kali Dat Pande, for the plaintiffs are proceeding against it in the present suit Presumably Kali Dat got out of the difficulty in which he found himself, in consequence of his failure to complete the auction purchase according to law, by coming to terms with the judgement debtor, and the money raised by means of the mortgage deed in suit was actually applied to the acquisition of the property for the purchase of which it had all along been intended The mortgagee seems to have acted in good faith there is no necessity for presuming a mistake of law on his part (as suggested in the memorandum of appeal before us), for he may simply have failed to notice the date on the receipt shown him by Kali Dat Pande The failure of the latter to take necessary action within the period limited by law did not relieve him from all liability towards the court executing the decree his preliminary deposit was forfeited, and he was liable to make good any loss which might occur on a resale This liability he seems to have met by some private arrangement with the judgement-debtor, and by applying the money borrowed under the deed in suit substantially for the purpose for which it was actually raised Under all the circumstances it would not be just to hold that the mortgagee had failed to make reasonable inquiries as to the necessity for the loan, or permit the sons to retain the property acquired by means of the loan while repudiating all liability for the same This appeal therefore fails, and we dismiss it with costs

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KAPILDEO *v* THAKUR PRASAD

Appeal dismissed

1913 November, 18

Before Mr Justice Ryves and Mr Justice Piggott

DAN PRASAD AND ANOTHER (DEFENDANTS) *v* GOPI KISHAN AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908) order XL rule 1—Injunction—Receiver—Application for temporary injunction as to property in suit—Order putting each party in possession of part pending the suit

The defendants in a suit for partition made an application to the court touching the custody of the property the subject matter of the suit The court thereupon directed that until the determination of the suit the plaintiffs should have the control and management of a portion of the property in suit, and the defendants of another portion *Held* that the order was a legal order and a

*First Appeal No 110 of 1913 from an order of B J Dalal, District Judge of Ramgarh, dated the 23rd of January, 1913

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proper order in the circumstances and not the less so because the court had acted *suo motu* The order practically amounted to one under order XL rule 1 of the Code of Civil Procedure, 1908

IN this case the defendants in a suit for partition before the District Judge applied to the court for a temporary injunction concerning the custody of the property in suit The District Judge on this directed that, until the determination of the suit, the plaintiffs should have the control and management of a portion of the property in suit and the defendants of another portion The defendants appealed against this order, contending that the order was *ultra vires* and should not have been passed upon an application for a temporary injunction such as was before the court

Dr *Surendra Nath Sen*, for the appellants

Mr *W Wallach*, Munshi *Govind Prasad* and Munshi *Parmeshwar Dayal*, for the respondents

RYVES and PIGGOTT, JJ —This is an appeal against an order of the District judge of Azamgarh, who, in the course of a suit for partition pending before him, has seen fit to direct that until the determination of the suit the plaintiffs shall have the control and management of a portion of the property in suit, and the defendants of another portion The order is attacked before us on the ground that it is *ultra vires* and that it should not have been passed upon an application for a temporary injunction made by the defendants, which was pending before the District Judge when he passed the order under appeal We think that, although the District Judge did not stop to consider precisely under what portion of the Code of Civil Procedure he was acting he has in effect appointed the plaintiffs to hold possession as receivers of a portion of the property in suit and the defendants to do the same in respect of another portion The order itself seems to us not *ultra vires*, but one covered by the provisions of order XL rule 1 It has been argued before us, however, that the effect of this order is to remove the defendants from possession or custody of property from which the plaintiffs had not a present right to remove them We think this objection does not lie in the mouth of the defendants in view of the attitude taken up by them in their written statement As for the plea that the order complained of should not have been passed on the application for a temporary injunction, we find that it was as a

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matter of fact passed upon a consideration of the allegations made in that application and in the reply filed on behalf of the plaintiffs and all the circumstances of the case as a whole A court has a right to proceed under order XL, rule 1, where it appears to it to be just and convenient to do so, and the order is not improper or illegal merely because it was made *suo motu* Finally it was contended before us that the order was made without notice to the parties and without giving the defendants in particular an opportunity of showing cause against it. We have heard counsel for the defendants at length on the facts of the case, and it seems to us that the order was a good and equitable order, suited to the circumstances of the case, and we are not, therefore, disposed to interfere with it merely on the ground that formal notice of the intention to take action under order XL was not given to the parties The result is that this appeal fails and we dismiss it We leave the parties to bear their own costs of the appeal

Appeal dismissed

Before Mr Justice Ryves and Mr Justice Piggott

1913 November, 18

RANG LAL (DEFENDANT) v. ANNU LAL AND OTHERS (PLAINTIFFS)*

Act No VII of 1889 *(Succession Certificate Act) section 4—Succession certificate—Assignment of debt covered by certificate—Certificate also made over to assignees—Rights of assignees*

The widow of a separated Hindu obtained a certificate of succession for the collection of a debt due to her deceased husband She assigned the debt and also handed over the succession certificate to the assignees *Held* that the assignees were competent to sue and get a decree for the debt The widow could undoubtedly assign the debt and it was not necessary, even if it were possible for the assignees to obtain cancellation of the certificate granted to the widow and the issue of a fresh certificate in their favour

Karuppasami v *Pichu* (1) distinguished *Allahdad Khan* v *Sant Ram* (2) not followed *Durga Kunwar* v *Matu Mal* (3) referred to

THE facts of this case were as follows —

On the 21st of February 1898, Megh Nath as manager of a joint Hindu family executed a mortgage of three biswas odd in mauza Bhojpur, in favour of Mihin Lal and Duli Ram, who advanced

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* ... m a decree of E C Allen District Judge ... ust, 1912 confirming a decree of Pratap ... Mainpur dated the 12th of January,

(1) (1891) I. L. R. 15 Mad., 419 (2) (1912) I. L. R., 35 All., 74

(3) (1913) I. L. R., 35 All., 311

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Rupees 600 each on the security of the said property Both mortgagees died. Plaintiffs 1 to 4 are the surviving members of the joint family of which Mihin Lal was the head Duli Ram left surviving him an adopted son, Gulab Gulab also died, leaving a widow, Musammat Bichitra Kunwar, as sole heir She applied for and obtained a succession certificate under Act VII of 1889, enabling her to realize the amount due to Gulab under the mortgage This debt was the only one specified in the certificate, and Musammat Bichitra Kunwar alone was entitled to it. She, however, assigned her mortgagee rights to three persons and at the same time gave them the certificate she had received. These three persons are plaintiffs 5 to 7 The defendants are Megh Nath, his son Rang Lal, and a minor grandson Musammat Bichitra Kunwar was also cited as a *pro formâ* defendant Rang Lal alone defended the suit One of the principal grounds of defence related to Musammat Bichitra Kunwar's alleged incapacity to assign the mortgagee rights of Duli Ram. This incapacity was based solely on the allegation that Gulab was not the adopted son of Duli Ram Both the lower courts found against the defendant on this point and de reed the suit The defendant appealed to the High Court

Dr *Satish Chandra Banerji* and Munshi *Gulzari Lal*, for the appellant

The Hon ble Pandit *Moti Lal Nehru*, for the respondent.

RYVES and PIGGOTT JJ —This appeal arises out of a suit for sale on a mortgage The facts are as follows —

On the 21st of February, 1898, Megh Nath as manager of a joint Hindu family executed a mortgage of three biswas odd in mauza Bhojpur, in favour of Mihin Lal and Duli Ram, who advanced Rs. 600 each on the security of the said property Both mortgagees are dead Plaintiffs 1 to 4 are the surviving members of the joint family of which Mihin Lal was the head Duli Ram died leaving surviving him, an adopted son, Gulab Gulab died, leaving a widow, Musammat Bichitra Kunwar, as sole heir She applied for and *obtained a succession certificate under Act VII of 1889*, enabling her to realize the amount due to Gulab under the mortgage This debt was the only one specified in the certificate, and it is to be noted that Musammat Bichitra Kunwar alone was entitled to it.

She, however, assigned her mortgagee rights to three persons and at the same time gave them the certificate she had received. These three persons are plaintiffs 5 to 7. The defendants are Megh Nath, his son Rang Lal, and a minor grandson. Musammat Bichitra Kunwar was also cited as a *pro formâ* defendant.

Rang Lal alone defended the suit. The only part of the defence that need now be considered relates to Musammat Bichitra Kunwar's alleged incapacity to assign the mortgagee rights of Duli Ram. This incapacity was based solely on the allegation that Gulab was not the adopted son of Duli Ram.

Both the lower courts have found against the defendant on this point and have decreed the suit.

The only point pressed in this appeal before us is that section 4 of the Succession Certificate Act is a bar to plaintiffs 5 to 7, obtaining a decree because they had not obtained a certificate under that Act.

This line of defence was not taken in the written statement, but in disposing of the issue as to whether Musammat Bichitra Kunwar was Duli Ram's heir the first court held that as she had obtained a succession certificate in respect of Duli Ram's share in the mortgage in suit, apart from anything else, it entitled her to recover the debt from the defendants. . . . I hold that in the first place it is proved that Gulab was the adopted son of Duli Ram, and secondly the succession certificate filed by the plaintiffs (5 to 7) in favour of their vendor is a sufficient authority for them to maintain the suit. As both these findings were attacked in appeal to the court below the appellant is entitled in second appeal to raise the question whether the Succession Certificate Act prevents plaintiffs 5 to 7 from obtaining a decree.

Two cases have been cited in support of the appeal, *Karuppasami* v. *Pichu* (1) and *Allahdad Khan* v. *Sant Ram* (2). In the first case the head note runs:—"One Suppamal lent a sum of money to the defendant and died leaving an adopted son who assigned the debt to the plaintiff. Neither the plaintiff nor his assignor obtained a certificate under Act VII of 1889. The plaintiff now sued to recover the amount of the assigned debt.

(1) (1891) I. L. R. 15 Mad. 419. (2) (1912) I. L. R. 35 All. 74.

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v
AYUDHIA LAL.

Held, that the plaintiff was not entitled to recover, no certificate having been obtained under Act VII of 1889'

In the present case a certificate under the Act had been obtained by the assignor, and it was produced by the assignee plaintiff This fact distinguishes the Madras case

In the second case, one Bahadur Khan, the mortgagee, died leaving a number of heirs Of these, one Farzand Ali obtained a succession certificate for the collection of the mortgage debt due to Bahadur Khan Farzand Ali subsequently assigned the mortgage debt to Sant Ram, together with his right to sue for the same, and made over to the assignee the succession certificate which he had obtained Sant Ram brought a suit on the strength of that assignment for enforcement of the mortgage A Divisional Bench of this Court held that the suit was not maintainable In this case also the facts are different from the present case There one heir, out of several obtained a certificate to collect a debt due to all the heirs This certificate gave him a personal right to sue, and such a right is expressly declared to be incapable of transfer [Section 6 (e) of Act IV of 1882] Besides Farzand Ali was only entitled to part of the mortgage, he could not therefore assign the whole mortgage debt The actual decision of the case then does not help the appellant There are, however, certain observations of the learned Judges in their judgement which do support his contention. They say —"The Act does not in so many words say that the certificate must be one in favour of the plaintiff, but we think that that is the meaning of the provision The declared object of the Act is to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons Section 16 of the Act protects a debtor of a deceased person who pays a debt in good faith to the person to whom the certificate was granted An assignee of the person to whom the certificate was granted does not appear to come within the section. From this it would appear that the person to sue for the debt is the person to whom the certificate was granted'

With all respect to the learned Judges concerned, we think that in these remarks they went beyond what was necessary for the decision of the particular case before them, and we are unable to

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RAMO LAL v. ANNU LAL

concur in the line of reasoning adopted They had before them a plaintiff with a defective title: he was suing to collect the whole of a certain mortgage debt on the strength of a transfer from the owner of a part only of the mortgagee rights He claimed that this defect was cured by the fact that his transferor had received a certificate for the collection of the entire debt the learned Judges rightly point out that section 16 of the Succession Certificate Act (No VII of 1889) protects a debtor who makes a payment to the holder of a succession certificate, but contains no provision extending such protection to a transferee from such holder We have also ventured to point out that the right to sue for the entire debt conferred by a succession certificate is a personal right which is not transferable apart from the ownership of the debt itself These considerations are quite sufficient to justify the decision in the reported case In the case now before us, however, we must hold on the findings arrived at in the court below that Musammat Bichitra Kunwar was the owner of the entire mortgage debt, and she had a right of transfer in respect of this ownership —*Vide Durga Kunwar* v *Matu Mal* (1) The facts of that case were very much on all fours with those now before us, and it is curious to note that the right of the transferee from the widow to maintain a suit was there affirmed, without any question being raised as to a succession certificate having been obtained either by the widow or by her transferee The present case is a much stronger one The only point taken before us is that the suit is barred, as regards the plaintiffs Nos 5 to 7, by the provisions of section 4 of Act VII of 1889, because they are unable to produce a succession certificate for the collection of their share of the mortgage debt The answer is that they have produced such a certificate, duly granted to Musammat Bichitra Kunwar, and made over to them by that lady when she transferred to them what she had a perfect right to transfer, *viz*, her ownership in respect of a share of the debt itself We are at least doubtful whether these plaintiffs could legally have obtained a succession certificate in their own names They certainly could not have done so without first obtaining an order for the cancellation of the certificate already granted to Musammat Bichitra Kunwar We do not believe that the Legislature in enacting Act No VII of 1889 intended either to take away from

(1) (1913) I. L. R., 35 All., 311

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the holder of a succession certificate any right of transfer he might possess in respect of the *corpus* of the debt itself, or to require that any such transfer should necessarily be followed by a revocation of the succession certificate already granted and the collection of fresh fees upon the grant of a second one in favour of the transferee

We hold, therefore, that this suit is maintainable as it stands and we dismiss this appeal with costs

Appeal dismissed

APPELLATE CRIMINAL

1913
November 1

Before Mr Justice Tudball and Mr Justice Ryves

EMPEROR v RAM DAYAL AND OTHERS *

Act No XLV of 1860 (*Indian Penal Code*) *section* 306—*Abetment of suicide*—Sati

Held that persons actively assisting a Hindu widow in becoming a *sati* are guilty of the offence of abetment of suicide as defined in section 306 of the Indian Penal Code

THE facts of the case are fully set out in the judgements Shortly they were as follows —

One Ram Lal, Brahman, of village Jarauli, died early in the morning of the 27th of June, 1913 His widow expressed her intention to become *sati* Her relations and neighbours tried to dissuade her, but she did not listen to them. They, thereupon, sent the chaukidar to the thana, 8 miles off, to warn the police of her intention They, however, went on making preparations to take the body to the burning ground, which was two furlongs from the village The police did not arrive in time, and the body was carried to the burning ground, the widow accompanying the bier The accused prepared the funeral pyre, on which the widow sat with the head of her husband on her lap She took off her ornaments and handed them over to one of the accused She demanded *ghi*, which was given her and which she poured on herself and the pyre. She then asked for fire, but as to this the witnesses seem to have agreed to say that it was refused and that the pyre burst into flame of itself in answer to the prayers of the widow

On these facts the Sessions Judge convicted five of the persons

* Criminal Appeal No 531 of 1913 from an order of E O Allen Sessions Judge of Mainpuri, dated the 17th of July 1913

most intimately connected with this transaction of abetment of suicide and sentenced them to two and one and a half years' rigorous imprisonment The accused appealed, and the learned Judge of the High Court before whom the case came on for hearing issued notice to them to show cause why the sentences should not be enhanced

The Hon ble Pandit *Moti Lal Nehru* (with him Babu *Satya Chandra Mukerji*), for the accused —

The accused are charged with abetment of suicide The essentials of the offence are instigation engaging in a conspiracy for the doing of that thing or aiding in the act In the present case the finding is that there was no instigation, but the Judge has held that the accused engaged in a conspiracy for the commission of *sati* The facts proved by the prosecution witnesses are—

(1) that the accused tried to dissuade her from immolating herself and sent information to the police,

(2) that they resolutely refused to burn the funeral pyre, and

(3) that they carried out certain details under her orders, such as preparing the pyre and supplying her with *ghi* &c , but that they knew these would be infructuous without the final act of setting fire, which they never did

This was taking all reasonable precautions against the actual act of suicide being committed, and the finding is, therefore, wrong

The accused had taken effectual measures to prevent the act and could not be held guilty of aiding in the act It was a gross negligence of the police not to have arrived in time

The accused stated that the details which they carried out under her orders were carried out on account of fear But they had done all they could to prevent her from immolating herself and had refused to light the pyre They were not bound to drag her off the funeral pyre

Assuming what the accused did was technically an offence, a light sentence would meet the ends of justice

The Assistant Government Advocate (Mr *R Malcomson*), was not heard in reply

TUDBALL, J —The five appellants Ram Dayal, Dodraj, Chote, Kankuar and Adhar Singh have been convicted of the offence of abetment of suicide under section 306 of the Indian Penal Code

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The two first were sentenced to two years' rigorous imprisonment each and the other three to one and a half years' rigorous imprisonment each.

On the appeal coming before a Judge of this Court, he directed that notice should issue to the appellants to show cause why their sentences should not be enhanced. Cause is shown on their behalf. The appeal and revision are heard together.

The appellants are all Brahmans. Ram Dayal and Dodraj are residents of the village of Jarauli in the Mainpuri district. The other three are residents of villages in the neighbourhood thereof. The facts of the case are nearly all admitted and are simple.

One Ram Lal, Brahman, cousin to Ram Dayal and nephew of Dodraj and resident of Jarauli, died of his sickness about day break on the 27th of June last, leaving a young widow Musammat Jai Debi. Thereupon the widow announced her intention of committing *sati*. The male members of the family argued with her, but she persisted in her intention. Neighbours were called in to assist, but with no effect. Finally one of the village chaukidars was sent off to the local police station to give word to the officer in charge. This police station is about eight miles from the village, and it is in evidence that the chaukidar arrived there at about 11 a. m. It was a rainy morning. Abut 9 a. m, the widow ordered the body to be carried to the burning ghat, which is a few hundred yards outside the village. The bier was carried by the four accused Ram Dayal, Dodraj, Kankuar and Adhar Singh, while the fifth, Chote, walked beside it. The widow followed it. A rumour of the impending *sati* had clearly spread to many of the neighbouring villages. A crowd of spectators, roughly estimated at from fifteen hundred to two thousand in number, had assembled. Arriving at the burning ghat, the widow directed the funeral pyre to be built at a certain spot. Wood and cow-dung fuel had been collected. Ram Dayal and Dodraj built the pyre, the other three accused handing the materials to them. The two former then placed the corpse upon it. Jai Debi then, after walking round it seven times, mounted the pyre, sat down and placed the head of the corpse on her lap. She stripped off her ornaments and threw them into a cloth held by Chote and Dodraj.

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She then demanded *ghi* Dodraj handed her a *lota* full She poured it over the pyre and her own person She demanded more and Ram Dayal gave it to her This also she poured over herself and the pyre Then Ram Dayal also poured some over her and the pyre. The pyre was then fired, but the witnesses refused to state by whose hand this was done

In a short time the woman and the corpse were both consumed When the police arrived at about 3 p m, they found a heap of smouldering ashes and burnt bones One of the two village chaukidars was present at the scene

The prosecution witnesses state that Ram Dayal and Dodraj to the very end protested against the action of the widow and tried to dissuade her The appellants themselves did not deny the parts they respectively took in the matter, except that Ram Dayal did not admit that he poured *ghi* over the woman, though the evidence proves that he did do so

Both the witnesses and the accused stated that when all was ready and the widow demanded fire, Ram Dayal and Dodraj refused to give it to her, telling her that if there were any virtue in her she could produce it for herself, whereupon she whispered into the ear of the corpse and raising her arms aloft prayed to God, and shortly after the pyre burst into flame The witnesses and the accused also have told stories of miraculous deeds done by the widow that morning when they were trying to dissuade her from committing *sati*, how she held burning camphor in her two hands clapped together and how she smote an impudent girl into a fit with a glance of her eye and subsequently restored her to health, and how she caused the rain to cease at about 9 a m The accused Ram Dayal and Dodraj both further state that she threatened to curse them both and cause them to be burnt up if they did not allow her to be *sati*. It is clear that the sympathies of the witnesses are naturally with the accused and that there is a conspiracy of silence as to who actually fired the funeral pyre It is equally clear that the miraculous stories have been invented for this purpose The theory of spontaneous combustion put forward is equally unworthy of belief as the alleged miracles and I have no doubt in the circumstances that the pyre was fired either by the widow or one or both of the accused Ram Dayal and Dodraj

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None of the assembled crowd would have dared to interfere It is urged on behalf of the accused that the acts proved to have been committed by them are insufficient to constitute abetment; that though they built the pyre and placed the corpse upon it and supplied the *ghi* to the widow, still it clearly was not their intention to aid the doing of the *sati*, because they refused to provide the necessary fire and because they had sent word to the police It is also urged that they must have felt sure that she could not obtain fire elsewhere The argument in my opinion has no force. It is clear that they actively assisted right up to the last act It is clear beyond all doubt that they were sure that the widow would commit *sati* The fact that they sent word to the police is a strong indication of this If they were overawed by the alleged miracles (which I do not believe) they must have been doubly sure The whole country side had been aroused.

To plead that they did everything necessary except the very last act without the intention of assisting her to commit suicide is to ignore facts and to put aside all experience of human nature A man's intentions are indicated not only by his words but also by his deeds Miracles have been invented to hide a most important fact, and joined to this it is clear that no really effective steps were taken to prevent the suicide A very little force would have been necessary to prevent the woman ascending the pyre. Moreover, it was not absolutely necessary to burn the corpse at so early an hour Though information had been sent to the police, no serious attempt was made to await their arrival on the scene Sixteen miles had to be walked before they could arrive and the accused must have known that no police officer could possibly arrive until *after* midday

Fully believing that the woman was determined to be burnt with her husband's body, they did all that was necessary to enable her to commit suicide except the furnishing of fire They and the witnesses deliberately conceal the truth as to the last act and concoct miracles for the purpose They do not state that they took any steps to prevent her taking fire or matches They took no active steps to prevent the suicide, and they hastened a funeral which in the circumstances they ought to have have delayed and would have delayed if they had been sincere in their remon strances.

Sati may or may not be forbidden by the Hindu religion, but it was once a common practice, and the sympathies of the people, at least of the unenlightened people, are all with *sati* and it is looked upon as a meritorious deed

I have no hesitation in holding that, though the accused may in the beginning have sincerely remonstrated with the widow, they finally gave way to her determination and intentionally aided the doing of the deed The circumstances of the case and their acts and omissions leave no room for doubt

On behalf of Chote Lal and Kankuar and Adhar Singh it is urged that they did very little and cannot be said to have abetted the deed. It is true that they did less than the other two, but they took an active part in the carrying of the body and the preparation of the pyre, and I have no doubt as to their intention, though they are neither relatives nor residents of the village I would, therefore, maintain the convictions and dismiss the appeals

In regard to sentences I think those imposed on Ram Dayal and and Dodraj are far too lenient Any relaxation of the severity of the law in such a matter will result in the recurrence of the evil which took so many years to decrease to a minimum The feelings and beliefs which prompt a *sati* still exist, and but little encouragement would make many others act upon them I would, therefore, enhance the sentences in the cases of these two accused to four years rigorous imprisonment I would not interfere with the cases of the other three accused

RYVES, J—This appeal came before me during the vacation and was very ably argued by Mr *Satya Chandra Mukerji* It has again been very ably argued by Pandit *Moti Lal* from a somewhat different point of view I am now, as I was then, however, of opinion that the conviction of the appellants was right, and I agree with the conclusions of my learned brother Ram Lal had been ill for some months, and his young widow evidently had made up her mind to become *sati* at his death in spite of the fact that she had an infant child Her relations tried to dissuade her, but when they found that she was determined, they yielded and helped her to carry out her wish All persons who actively assisted knowing her intention are guilty The question of sentence is more difficult

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Long before 1829, when Regulation XVII declared *sati* to be illegal and criminal, Government had tried to check the practice, by Regulations and by Circular Orders issued by the Nizamat Adawlut with the sanction of Government The essence of these rules was that *sati* was only legal if it was strictly in accordance with the *shastras*, and if the prescribed procedure was adopted These rules, however, did little to check the usage, which was very prevalent in these provinces No less than ten cases of illegal *sati* are reported in a single volume of the reports of the Nizamat Adawlut

In one of these cases—*Government* v *Bhurachee* (1)—one of the learned judges says —' The sati was irregular, inasmuch as police officer was not there, and as the widow (a Brahminee) burnt without the corpse of her husband but frequent irregularities occur in this detestable practice Our Government by modifying the thing and issuing orders about it have thrown the ideas of the Hindus on the subject into a complete state of confusion They know not what is allowed and what interdicted, but upon the whole they have a persuasion that our Government are rather favourable to *sati* than otherwise They will then believe that we disallow the usage when we prohibit it *in toto* by an absolute and peremptory law'

The Regulation of 1829 seems to have had immediate effect, and the practice was almost completely stamped out In fact I can only find three reported cases of *sati* in the Law Reports for these provinces and for Bengal since that date They occurred in 1834 1854 and 1871

It is thus obvious that the consensus of public opinion was and is opposed to *sati* But the sentiment, whether religious or merely superstitious, which of old prompted the widow to burn herself on her husband s pyre and excited the approval of the multitude, is still alive Thus it is significant that in many of the old cases, as in this, there was a conspiracy of silence and the firing of the pyre was attributed to supernatural agency

In my opinion, therefore, a deterrent sentence is called for, and I agree in the order proposed by my learned colleague

BY THE COURT —The appeals are dismissed The sentences imposed on Chote, Kankuar and Adhar Singh are confirmed and the rule issued by the court as to them is discharged. The

(1) (1821) N A Rep, Vol. II p 91

sentences on Ram Dayal and Dodraj are hereby enhanced to four years' rigorous imprisonment each with effect from the date of the conviction by the learned Sessions Judge

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Appeal dismissed

APPELLATE CIVIL

1913 *November*, 19.

Before Mr Justice Tudball and Mr Justice Muhammad Rafiq

FATMATUL KUBRA (JUDGEMENT DEBTOR) *v* ACHCHI BEGAM (DECREE HOLDER) NAZIRUDDIN AND OTHERS (JUDGEMENT DEBTORS) AND AZHAR HUSAIN (AUCTION PURCHASER) *

Execution of decree—Sale in execution—Grove or garden with house being ancestral property and forming part of a mahal—Sale by Civil Court amin—Jurisdiction—General Rules (Civil) of 1911 *chapter IV rules* 5 *and* 8

Held that a grove or garden part of which was occupied by a house and which was a part of a mahal and assessed to revenue and had been owned continuously by the family of the proprietors for over fifty years was ancestral land within the meaning of Rule 5 of Chapter IV of the General Rules for the Civil Courts and could not be sold by the court amin in execution of a Civil Court decree but only through the Collector after the decree had been transferred to him for execution

THE facts of this case are fully set forth in the judgement Briefly stated they were as follows —In execution of a Civil Court decree a grove or garden was sold by auction through the court amin. A house stood on a small portion of this land. It appeared that this land was assessed to revenue and included in a certain mahal, and that it formed a portion of that mahal The property had been with the family of the judgement-debtor for well over fifty years

The judgement-debtor applied to have the sale set aside on the ground, *inter alia*, that the land was "ancestral land" and that the decree should, therefore, have been transferred to the Collector for execution The application was dismissed The judgement-debtor appealed

Babu *Lalit Mohan Banerji* (with him Maulvi *Muhammad Rahmat-ul lah* for Maulvi *Ghulam Mujtaba*) for the appellant.

The property sold forms a portion of a mahal It also satisfies the other conditions of the definition of "ancestral land" as

* First Appeal No 371 of 1912 from a decree of Pirthi Nath Subordinate Judge of Bareilly dated the 22nd of June 1912

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The Regulation of 1829 seems to have had immediate effect, and the practice was almost completely stamped out In fact I can only find three reported cases of *sati* in the Law Reports for these provinces and for Bengal since that date They occurred in 1834, 1854 and 1871

It is thus obvious that the consensus of public opinion was and is opposed to *sati* But the sentiment, whether religious or merely superstitious, which of old prompted the widow to burn herself on her husband's pyre, and excited the approval of the multitude, is still alive Thus it is significant that in many of the old cases, as in this, there was a conspiracy of silence and the firing of the pyre was attributed to supernatural agency

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1913
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Held that a grove or garden part of which was occupied by a house and which was a part of a mahal and assessed to revenue and had been owned continuously by the family of the proprietors for over fifty years was ancestral land within the meaning of Rule 5 of Chapter IV of the General Rules for the Civil Courts and could not be sold by the court amin in execution of a Civil Court decree, but only through the Collector after the decree had been transferred to him for execution

THE facts of this case are fully set forth in the judgement Briefly stated they were as follows —In execution of a Civil Court decree a grove or garden was sold by auction through the court amin. A house stood on a small portion of this land. It appeared that this land was assessed to revenue and included in a certain mahal, and that it formed a portion of that mahal The property had been with the family of the judgement debtor for well over fifty years

The judgement-debtor applied to have the sale set aside on the ground, *inter alia*, that the land was "ancestral land" and that the decree should, therefore, have been transferred to the Collector for execution The application was dismissed The judgement-debtor appealed

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contained in Rule 5 of Chapter IV of the General Rules for the Civil Courts The sale should, therefore, have been held by the Collector in accordance with clause (1) of Rule 8 of the said Chapter. The decree should have been transferred to the Collector for execution under section 68 of the Code of Civil Procedure, and the sale by the Civil Court Amin was without jurisdiction and void. Clause (1) of Rule 8 applies to all ' ancestral lands " without exception of any kind A grove or garden may be either ancestral land or non ancestral If it is the former, as in the present case, the sale must be held under clause (1) Clause (3) is an exception to clause (2) and not to clause (1)

Munshi *Govind Prasad* for the respondents :—

The three clauses of Rule 8 deal with three distinct kinds of property which are mutually exclusive of each other Clause (1) treats of " ancestral land," and that clause is exhaustive of that class of land Non ancestral land is dealt with by clauses (2) and (3) Groves, gardens and lands occupied by houses are grouped in a separate class by themselves in clause (3), the inference is that clauses (3) and (1) were not intended to overlap each other. All groves and gardens come under clause (3) , there are no qualifying words, such as " non ancestral groves and gardens " All groves and gardens must therefore, be sold in accordance with clause (3) by a Civil Court Amin In the second place, groves and gardens like resumed *muafi* lands, form part of the miscellaneous *haqiat* separately assessed to revenue, and do not form portions of a mahal , they do not, therefore, come within the term " ancestral land '

Babu *Lalit Mohan Banerji* was not heard in reply

TUDBALL and MUHAMMAD RAFIQ JJ —The facts of this case, so far as it is necessary to state them for deciding this appeal, are as follows —A decree-holder in execution of her decree attached a grove or garden in mauza Udaipur in the Bareilly district in which stands a house The area of the grove is some ten bighas *pacca* The court sold the property through the agency of the Court Amin under clause (3) of rule 8 of chapter IV of the General Rules for the Civil Courts Among other objections, one objection taken is, that the land in question is ancestral land and could only be sold by the Collector after transfer of the execution

of the decree to his court, under section 68 of the Code of Civil Procedure, and that, therefore, the proceeding of the court below is entirely without jurisdiction. On the issue remitted to the court below, that court held that the land in question is ancestral land but it has expressed its opinion that in spite of that it is a grove or garden such as is contemplated in clause (3) of rule 8 of chapter IV of the General Rules mentioned above. 'Ancestral' lands for the purposes of these rules are 'all lands being mahals or shares in mahals or portions of mahals which have been owned continuously by the proprietor from the 1st of January, 1860, etc." The court below has held that this property has been in the family of the judgement-debtor for well over fifty years. It has also held that it is a portion of a mahal. The patwari's evidence also shows that it is part of mahal *safed* in mauza Udaipur and is assessed to revenue. It is, therefore, clear to us that the property is ancestral land within the definition given in the rules.

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It is urged however, on behalf of the auction purchaser that the gardens groves and lands occupied by houses all fall within clause (3) of rule 8 whether they are ancestral or non ancestral. With this we find it impossible to agree. Lands which are ancestral also include gardens or groves. This is clear from a consideration of rule 8, clause (2), which lays down that non ancestral land shall be sold by the Collector, who is to be appointed by the court for this purpose but specially exempts "gardens, groves or lands occupied by houses or appurtenant thereto." An examination of clause (1) shows that in respect of ancestral lands there is no such exception. All ancestral lands have to be sold in accordance with rule 1. Non ancestral lands have to be sold in the manner laid down in rule 2, except gardens, groves or lands occupied by houses or appurtenant thereto. These latter have to be sold in the manner laid down in clause (3) of the rules. If there had been any intention to exempt ancestral lands, the exemption would have been clearly stated in clause (1), as it has been clearly stated in clause (2) in respect of non ancestral lands. In our opinion the sale by the court below through the Amin, of the land in question was entirely without jurisdiction, and under the law it was necessary for the court to transfer the decree under section 68 of the Code of Civil Procedure to the Collector, who

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then alone would have jurisdiction to execute the decree and put the property to sale In this view, it is unnecessary to go into any other point in the appeal We allow the appeal, set aside the sale and direct the record to be returned to the court below with instructions to proceed with the execution of the decree, according to law. The appellant will have her costs of the appeal

Appeal allowed.

1913 *November*, 21.

Before Sir Henry Richards, Knight Chief Justice and Justice Sir Pramada Charan Banerji

NARSINGH SINGH AND OTHERS (DEFENDANTS) v. ACHHAIBAR SINGH AND OTHERS (PLAINTIFFS).*

Mortgage—Purchase by mortgagees of part of mortgaged property—Tender of proportionate part of mortgage money by purchasers of the residue—Tender refused on ground of subsequent mortgages affecting the property—Suit for redemption—Form of decree

Tender of payment under section 83 of the Transfer of Property Act was made by the purchasers of part of the property comprised in a mortgage (the rest of the property having been purchased by the mortgagees themselves) who paid into court what they believed to be the proportionate amount due on the share purchased by them and within the period limited by the mortgage deed This tender was however refused upon the ground that there were two subsidiary mortgages affecting the property under which further sums were due The mortgagors thereupon brought a suit for redemption expressing their readiness to pay what might be found by the court to be the proper proportionate amount due by them in respect of the property which they had purchased.

Held on the finding that the plaintiffs when they made their original tender were unaware of the existence of the two subsidiary bonds that the court below was right in giving a decree for redemption on payment of the amount due under the three mortgages in respect of the share purchased by the plaintiffs and for possession at the corresponding period of the following year

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court The facts of the case are set forth in the judgement under appeal, which was as follows —

"The facts out of which this appeal arises are as follows: The predecessors in title of the plaintiffs respondents executed a usufructuary mortgage in favour of the predecessors of the defendants appellants, dated the 19th of May, 1852, of a one anna four pie share in mauza Bisapur for Rs 499 'with *sir*, *khudkasht* lands and *sair* items and all zamindari rights and cesses' The mortgage was redeemable on payment of the mortgage money in the

*Appeal No 117 of 1913 under section 10 of the Letters Patent

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pie share and he held only one fourth of that sum was now due on the deed in suit, that is, Rs 202, namely, Rs 124 12 0, on the first mortgage, and Rs 77 in all on the two later ones With regard to the well, he found that it had been constructed on the defendants' *khudkasht* land The defendants, who had the benefit of it and in whose share on partition it would be allotted, were not entitled to recover anything on this account from the plaintiffs He, accordingly, held that the plaintiffs were entitled to get possession in Jeth next, on payment to the defendants of Rs 202, but that as the plaintiffs had failed to deposit the full amount, they must bear the costs of the suit and were not entitled to mesne profits

"On second appeal three grounds are taken —(1) that the suit was premature; (2) that the courts below were wrong in making a conditional decree in the terms employed, and (3) that the plaintiffs were not entitled to redeem without paying for the construction of the well

"On the first point, it was argued that the suit was premature Redemption could only be had on payment of the whole of the mortgage money in Jeth The plaintiffs' tender, though made at the proper time, (*Note* —5th June, 1909, was first Asarh, but the 4th June, the last day of Jeth, was a holiday owing to a lunar eclipse) was insufficient and was, therefore, not a valid tender, and the defendants were justified in ignoring it Great stress was laid on the case of *Bansi* v. *Girdhar Lal* (1) The facts of that case, however, are very different There the plaintiff claimed possession of land by ejectment of the defendants The plaintiff had purchased the mortgagor's interests in the land at an auction in execution proceedings The defendants were usufructuary mortgagees under a mortgage prior to the attachment under the decree under which the plaintiff had bought The first court gave him a clear decree for possession. On appeal by the defendants, the lower appellate court varied this decree by making it a decree for possession on redemption of the usufructuary mortgage, that is, on condition of the plaintiffs' paying to the defendants Rs 240 within fifteen days The condition for redemption in the mortgage bond was the payment of Rs 240 in the month of Jeth in any year This Court held the plaintiff never tendered Rs 240 in Jeth nor offered to

(1) Weekly Notes, 1894 p 143

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redeem in Jeth, *or at any other time* Never having made a tender or offer of payment in Jeth, it was, consequently, held that he had no cause of action at the date of suit, and that the suit was, therefore, premature Now in this case the plaintiffs did make a tender of the amount they believed due under the mortgage of which they had purchased the equity of redemption They were apparently ignorant of the fact that by two subsequent deeds further sums had been tacked on to the original mortgage debt In any case the defendants claimed that the entire sums secured by the two later bonds were recoverable from the four pie share, and the court held that this was incorrect, and that only one-fourth of this sum was chargeable to that share In this state of things a suit was inevitable, in order to ascertain what was the actual amount of the mortgage money The plaintiffs made their tender, the defendants ignored it and when, in consequence, the plaintiffs' application was struck off, they had, I think, a good cause of action, and they undertook to pay whatever sums the court should determine over and above the sums already- deposited. The defendants admitted receipt of notice of plaintiffs' tender and also admitted that they did not appear They then can hardly be heard to say that the plaintiffs showed no readiness to pay the mortgage money at the proper time, and so had no cause of action The facts of this case are very similar to those in *Manorath Das* v. *Madho Das and others* (1), in which Lyle, J took the same view

"On the second point, I can not see what the defendants have to complain about Under the mortgage, the mortgagees are entitled to be redeemed in Jeth Under the decree of the court, their possession is maintained till Jeth and then if payment is made they must give up possession The condition imposed by the court is for the benefit of the defendants

"On the third point, it has been found as a fact that the well is in the defendants' own *khudkasht* land The plaintiffs do not lay any claim to it and as they derive no benefit from it, they are not liable to pay any thing towards its cost I dismiss the appeal with costs I extend the time for payment within four months from this date and delivery of possession of the property will be made in next Jeth."

(1) S A No 1102 of 1912 decided on the 27th of May 1913

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The defendants appealed.

Babu *Benoy Kumar Mukerji*, for the appellants.

The respondents were not called on to defend the appeal.

RICHARDS, C. J. and BANERJI, J.—We think that the view taken by the learned Judge of this Court was correct and we dismiss the appeal.

Appeal dismissed.

FULL BENCH.

1913
November, 8.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball and Mr Justice Piggott.

RAGHUBIR PRASAD AND OTHERS (DEFENDANTS) *v.* SHANKAR BAKHSH SINGH (PLAINTIFF)*

Act No VII of 1870 *(Court Fees Act), section* 7 (ix) , *schedule I, article* (1) *—Suit for redemption or foreclosure of a mortgage—Appeal—Court fee.*

The criterion laid down in section 7 (ix) of the Court Fees Act, 1870, for determining the court fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit.

In the case of appeals or cross objections in suits for redemption or foreclosure, in all cases in which the amount declared by the court to be due at the date of the decree can be ascertained by reference to the judgement and the decree, it is that amount at which the appeal or cross objections should be valued, and future interest should not be taken into account.

The rule in *Baldeo Singh* v *Kalka Prasad* (1) modified

THE question raised in this appeal, so far as the present report is concerned, was as to the proper amount of the court fee payable in respect of cross objections filed in an appeal from the decree in a suit for foreclosure of a mortgage The material facts appear from the following office report:

The plaintiff in this case claimed to recover Rs. 1,830 due on foot of mortgage, dated the 28th of July, 1880, *plus* costs of the suit and *pendente lite* and future interest at Rs. 3-2 0 per cent. per mensem, or in the alternative to have the mortgaged property foreclosed

A court fee of Rs. 11-4 0 was paid on the plaint on Rs. 150, the principal amount of mortgage

At the trial of the suit the court of first instance held that there was a prior mortgage subsisting on the property, and decreed

*Stamp Reference in Second Appeal No. 548 of 1912

(1) (1913) I. L R, 35 All., 94.

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the plaintiff's claim subject to his paying Rs 967, being the proportionate *quota* of the prior mortgage dated the 11th of November 1875 and additional court fee thereon and declared that on the said amount being paid the plaintiff was entitled to recover the said amount *plus* Rs 632 12 11 out of Rs 1 830 claimed together with future interest and proportionate costs The Court passed a decree for sale under order XXXIV rule 4 whereby the plaintiff was declared entitled to recover Rs 1 955 3 8 inclusive of costs i.e Rs 967 the amount of prior mortgage to be paid by the plaintiff as aforesaid and Rs 988 3 8 on foot of the plaintiff's mortgage inclusive of *pendente lite* interest

Against the said decree the plaintiff preferred an appeal to the lower appellate court in so far as it ordered payment of the amount of the prior mortgage valuing it at Rs 967 and paying a court fee of Rs 85 thereon The defendants filed cross objections to the decree under order XLI rule 22 The objections were valued at Rs 632 12 11 and a court fee of Rs 11 4 0 was paid thereon on the principal amount of the mortgage i e Rs 150 The decree appealed against was a decree for sale passed under order XXXIV rule 4 and the defendants appellants are liable to pay an *ad valorem* court fee on the amount of the decree inclusive of interest This being so a court fee of Rs 74-4 0 was payable by the defendants appellants on Rs 988 3 8 which should be the proper valuation of the cross objections filed by them in the lower appellate court. A court fee of Rs 11 4 0 having been paid there is therefore a deficiency of Rs 63 to be made good by the defendants appellants on the objections filed in the lower appellate court

The case having come up before a Division Bench the following order was made —

GRIFFIN and CHAMIER JJ —The Taxing Officer is of opinion that there was a deficiency of Rs 63 in the court fee paid by the defendants on the memorandum of objections presented by them to the lower appellate court The defendants do not accept his view The case is not covered by section 5 of the Court Fees Act therefore the decision of the Taxing Officer is not final and the question must be decided by the Bench which hears the appeal

The facts are as follows —The suit was for the recovery of Rs 150 principal and Rs 1 680 interest total Rs 1 830 on foot

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of a simple mortgage The Subordinate Judge held that the plaintiff was entitled to Rs 632 12 11 on account of principal and interest at the date of the suit, and he passed a decree for that amount with interest for six months at the contract rate, and thereafter till realization at the rate of six per cent per annum. His decree dated the 29th of April, 1911, which was prepared in the usual form declared that Rs 988 3 8 would be due to the plaintiff, on the 19th of October, 1911, on account of principal and interest on the mortgage in suit We omit the rest of the decree, as it is immaterial at present On the 2nd of June, 1911, the plaintiff appealed on a point which does not now concern us, and on the 25th of July, 1911, the defendants filed objections under order XLI, rule 22, asking that the suit should be dismissed They paid a court fee upon Rs 150 the amount of the principal sum secured by the mortgage The fee paid was certainly insufficient but the question is on what amount it should have been paid The Taxing Officer of this Court holds that they should have paid court fees on Rs 988 3 8 His view is supported by the decision of Tudball and Rafiq JJ in *Baldeo Singh* v *Kalka Prasad* (1) and we are informed by decisions of former Taxing Judges of this Court As at present advised we are unable to accept these decisions According to article 1 of schedule I to the Court Fees Act the court fee payable on objections filed under order XLI, rule 22 is *to be calculated according to the amount or value of the subject-matter* in dispute There appears to us to be no justification for the hard and fast rule which seems to have obtained in this Court that a mortgagor who in a memorandum of appeal or objections, contends that a preliminary decree for sale, passed against him, should be set aside *in toto*, should pay court fees on the amount declared to be due on the date fixed in the decree An appeal or objection may be, and often is, filed before the day fixed in the decree That was the case here. The amount payable by the defendants for redemption of the mortgage on the day when they filed their objections was less than the amount declared in the decree A mortgagor is entitled to redeem his property before the day fixed in the decree, and if he does so, he is not bound to pay the amount declared in the decree He may redeem on payment

(1) (1913) I L R, 35 All., 94

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of the principal and interest due on the day on which he pays the money. On the other hand, a court passing a preliminary decree for sale is not bound to allow six months for payment. It may, and often does, allow a much shorter time, and in such a case the appeal or the objections may be filed after the date fixed in the decree. In neither of the cases which we have instanced can there, in our opinion, be any justification for requiring court fees to be paid on the amount declared in the decree. The rule hitherto observed is, no doubt a convenient one for the Taxing Officer's department, but it appears to rest upon no principle, and we understand that it has been challenged on many occasions and that it does not obtain in any other High Court. The High Court of Bombay appears to disregard all interest accruing after the date of a suit on a mortgage so far as court fees are concerned. Where a mortgagor by appeal or objection challenges part only of a preliminary decree for sale, the practice is to require him to pay court fees on the amount which he says should be struck out of the decree, and in ascertaining the value of the subject matter of the appeal no attention is paid to the date fixed in the preliminary decree.

We think that the present state of affairs is unsatisfactory and we direct that this case be laid before the Chief Justice in order that he may consider the propriety of appointing a larger Bench to hear this appeal.

The case coming on before a Full Bench—

Munshi *Govind Prasad*, for the appellant, submitted that it was the intention of the Legislature that in all suits for redemption or foreclosure court fees should be paid on the sum secured by the mortgage deed. Therefore in this appeal the plaintiff should be allowed to pay court fees on Rs. 150, the sum secured. The defendant denied the plaintiff's right to redeem and the issue was, whether the plaintiff had a right to redeem, and is liable to pay court fees only on the sum secured by the mortgage deed. The amount which at the date of the decree the plaintiff was held to be entitled to was the sum of Rs. 632-11-11, which the Court found to be due to him upon his mortgage. The additional sum mentioned in the decree as payable by the defendant included interest for a period subsequent to the date of the decree.

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Mr. *W. Wallach* (for the Government), submitted that it was true that in a suit for redemption or foreclosure court fee was payable on the principal amount secured by the mortgage deed. But that only applied to the suit which was instituted in the court of first instance In the case of an appeal, the court fee payable was an '*ad valorem*' court fee on the subject matter of the appeal, (Schedule 1, article I, of the Court Fees Act) When one appeals; it does not matter if the lower court was right or wrong or what the issue was; he attacks the decree of the lower court and, therefore, he must pay court fees on the amount decreed by that court, *Baldeo Singh* v. *Kalka Prasad* (1)

BANERJI, TUDBALL and PIGGOTT JJ :—This appeal arises out of a suit for foreclosure of a mortgage of the 28th of July, 1880. There were two sets of defendants, namely, the legal representative of the mortgagors and persons who had purchased a part of the mortgaged property. The purchasers are the appellants before us. In the court below they denied the mortgage on which the plaintiff's claim was based and they asserted that they had discharged an earlier mortgage and were entitled, if the plaintiff's mortgage was genuine, to hold up the payment made by them in discharge of the prior mortgage as a shield against the plaintiff's claim. The court of first instance found the plaintiff's mortgage to be genuine and Rs 632-12-11 to be due to the plaintiff upon that mortgage at the date of the decree. It accordingly made a decree directing the plaintiff to pay to the present appellants Rs 967, on account of the prior mortgage discharged by them and for sale of the mortgaged property in the possession of those defendants for the realization of the said amount, as also the amount found to be due on the plaintiff's own mortgage The plaintiff appealed to the court below from this decree and the appellants before us, who were defendants to the suit, filed cross objections, under order XLI, rule 22, of the Civil Procedure Code, disputing the genuineness of the plaintiff's mortgage, and his right to maintain the suit. They valued their cross objections at Rs. 632-12-11, but paid court fees upon Rs 150, the principal amount of the mortgage on which the plaintiff's suit was based. The taxing officer of this Court submitted a report to the effect that the defendants ought to have valued their objections in

(1) (1913) I. L. R., 35 All., 94

the court below at Rs 988-3 8 which included interest after the date of the decree of the court of first instance and up to the date fixed for payment. Objections having been taken to this report the matter came before a Division Bench and on the recommendation of that Bench the case has been laid before us for disposal of the question whether the appellants were liable to pay further court fee on their cross objections in the court below? We are clearly of opinion that the appellants were bound to pay court fees upon a larger sum than Rs 150 the principal amount of the plaintiff's mortgage It is true that in a suit for redemption or foreclosure the court fee is payable upon the principal amount secured by the mortgage But that applies to the suit which is instituted in the court of first instance In the case of an appeal the court fee payable is an *ad valorem* court fee on the value of the subject matter of the appeal—*See* schedule I article 1 of the Court Fees Act We have therefore to consider what was the subject matter of the cross objections in the court below and what was the value of that subject matter There can be no doubt that the subject matter of the cross objections was the amount which the court by its decree declared that the plaintiff was entitled to recover and not the principal amount of the mortgage The amount which at the date of the decree the plaintiff was held to be entitled to is the sum of Rs 632 12 11 which the court found to be due to him upon his mortgage The additional sum mentioned in the decree as payable by the defendants includes interest for a period subsequent to the date of the decree In valuing their cross objections the defendants were questioning the propriety of the decree in so far as it awarded to the plaintiff Rs 632 12-11 on the date of the decree The interest for the subsequent period was a necessary addition to the amount so awarded in accordance with the provisions of the Code of Civil Procedure order XXXIV We are of opinion that in all cases in which the amount declared by the court to be due at the date of the decree can be ascertained by reference to the judgement and the decree it is that amount at which the appeal or cross objections should be valued and future interest should not be taken into account The wording of the decree in this case is no doubt defective in this respect but its

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intention is clearly manifest if we refer to the judgement. The amount, therefore, at which the appellants ought to have valued their cross objections, as they did in the court below, was Rs. 632-12-11, and court fees ought to have been paid upon that amount This would come to Rs 48, and as Rs 11-4 0 was paid, there was a deficiency of Rs. 36-12 0. We allow the appellants two weeks to make good this deficiency.

APPELLATE CIVIL.

1913 *November*, 22

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

MUHAMMAD ALI KHAN AND OTHERS (PLAINTIFFS) *v* JAS RAM AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), *order XLI, rule* 10—*Appeal—Vakalatnama—Appeal presented by vakil whose vakalatnama was in fact defective.*

Where, by an oversight, the name of a vakil who had filed an appeal was omitted from the body of his vakalatnama it was *held*, on objection taken by the respondents, that the document was invalid and the appeal consequently had not been properly presented The force of this objection to the validity of the appeal was not lessened by the fact that it was raised at a very late stage of the proceedings, in fact after two orders of remand had been made by the court of first appeal

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows:—

"The plaintiffs appellants brought a suit in the court of the Munsif of Bulandshahr for possession of certain *abadi* land The claim was decided against them and an appeal was filed on their behalf in the court of the District Judge of Aligarh on the 10th of July, 1911 The appeal was filed by one Munshi Abdul Salam Khan, vakil, who at the same time filed his vakalatnama also The case was heard by the Additional Judge who remanded it to the lower court for the trial of certain issues The remand order was made on the 4th of August, 1911 The Munsif returned the case with his findings on the 28th of November, 1911 The parties filed cross objections on the 13th and 19th of December, 1911. The case was again remanded on the 22nd of January, 1912 The Munsif submitted his second finding on the 2nd of March, 1912. On the 18th of April, 1912, the respondent filed objections to the finding submitted by the Munsif. Munshi Abdul Salam Khan died prior to the submission of the first finding by the learned Munsif. The appeal was heard on the 1st of July, 1912, when a preliminary objection was taken to the effect that the memorandum of appeal had not

*Appeal No 60 of 1913 under section 10 of the Letters Patent.

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MUHAMMAD ALI KHAN v. JAS RAM

been properly presented to the court of the District Judge, inasmuch as the name of Abdul Salam Khan was not mentioned in the body of the vakalatnama The learned Additional Judge accepted the preliminary objection and dismissed the appeal. The plaintiffs appellants have come up in second appeal to this Court It is contended on their behalf that the omission of the name of vakil in the body of the vakalatnama was due to an oversight, and that considering that the objection was taken by the respondent at a very late stage it should not have been given effect to There can be no doubt that the omission of the name of Abdul Salam Khan from the body of the vakalatnama must have been due to an oversight But the question is whether such a mistake can be condoned and the appeal can be considered as properly presented The case of *Pokhpal Singh* v *Dambar Singh* (1) is against the contention for the appellants It was held in that case that a pleader whose name was omitted in the body of the vakalatnama was not duly appointed and that an appeal presented by him was not properly presented If Munshi Abdul Salam was not duly appointed by the plaintiffs appellants and if the appeal filed by him was not properly presented the facts that the objection was not taken till a very late stage in the case would not validate the presentation of the appeal. The appeal therefore fails and is dismissed, but considering the special circumstances of the case I make no order as to costs"

On this appeal :—

Mr *Sham Nath Mushran* (with him The Hon'ble Dr *Tej Bahadur Sapru* and Munshi *Iswar Saran*), submitted that the case of *Pokhpal Singh* v *Dambar Singh*, (1) relied on by the lower appellate court was distinguishable In that case objections were taken at the first opportunity The name of the pleader, though not written in the body of the vakalatnamah, was to be found on the reverse of it, just above the place where the pleader had signed acceptance Moreover certificate and affidavit of the payment of fee were also filed and both things put together showed that the pleader was appointed to file the appeal

Mr *A H C Hamilton* (with him Dr *Satish Chandra Banerji*), was not heard in reply

RICHARDS C J *and* BANERJI J —We *are unable to hold that* the view taken by the learned Judge of this Court was wrong We accordingly dismiss the appeal, but without costs

Appeal dismissed.

(1) (1909) 6 A L J (Notes) 110

1913
November, 24

Before Mr. Justice Rynes and Mr. Justice Piggott.

RAM CHARITRA RAI AND OTHERS (DEFENDANTS) v. JINSI AHIRIN (PLAINTIFF)*

Act (Local) No II of 1901 (Agra Tenancy Act), sections 95 and 167; schedule IV, group C, No. 34—Jurisdiction—Civil and Revenue Courts—Occupancy holding—Succession.

On the death of an occupancy tenant, a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour. This application was resisted by the zamindars, who denied that the applicant was legally the wife of the deceased tenant. The Revenue Court rejected the application for mutation, and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate, viz, the occupancy holding. No other property of the deceased was specified. *Held* that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act, 1901, and that the suit was not cognizable by a Civil Court. *Birham Khushal* v. *Sumera* (1) referred to.

THE facts of this case are set forth in the judgement of the Court. Briefly they were as follows:—

One Chikhuri, an occupancy tenant of the property in dispute, died. The plaintiff, alleging herself to be his widow, applied for mutation of names in her favour. The zamindars resisted the application and pleaded that the applicant was not the legal wife of Chikhuri. The Revenue Court rejected her application. She thereupon, brought this suit for a declaration of her right as the legally married wife of Chikhuri to possession of the holding. The court of first instance dismissed the suit, but the lower appellate court reversed the decree, and remanded the case for trial on the merits. Against this order of remand the defendants appealed to the High Court.

Mr. *M. L. Agarwala* (for the appellants) submitted that the real object of the suit was to get a declaration that the plaintiff was entitled to succeed as heir to the occupancy holding of the last tenant. There was no allegation that the deceased left any other property. Section 167 of the Agra Tenancy Act prohibited a suit in respect of any dispute or matter as to which a suit could be brought under schedule IV thereto. Item No. 34 of group (C) of the fourth schedule provided for a suit to obtain a declaration as to the name and description of the tenant of a holding. The dispute between

* First Appeal No. 123 of 1913 from an order of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 1st of May, 1913.

(1) (1913) I. L. R., 35 All., 299.

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RAM CHARITRA RAI v. JINSI AHIRIN.

the parties in the correction of jamabandi case was whether plaintiff had succeeded to the occupancy holding of the last tenant as heir. If a suit under section 95 *(a)* of the Tenancy Act had been brought the allegations made and the relief asked would have been substantially the same. He called the attention of the Court to the following cases: *Mahesh Rai* v. *Chandar Rai* (1) and *Subarni* v. *Bhagwan Khan* (2).

Munshi *Govind Prasad* (for the respondent) submitted that reading the plaint as a whole, the suit was cognizable by the Civil Court. The plaintiff wanted a declaration to the effect that she was the lawfully wedded wife of the deceased tenant and also wanted a declaration to the effect that she was entitled to his estate *(matruka)*. That declaration could not be given by the Revenue Court. Section 95 of Act II of 1901 did not apply because the suit did not fall within either clause (*a*) or (*b*) of the section. He referred to *Dukhna Kunwar* v. *Unkar Pande* (3), *Baru Mal* v. *Niadar* (4), *Niadar* v. *Baru Mal* (5) and *Birham Khushal* v. *Sumera* (6).

RYVES and PIGGOTT, JJ.:—This appeal arises out of the following facts:—one Chikhuri Ahir was the occupancy tenant of a certain holding in a village in the Ballia district. On his death Musammat Jinsi applied to the Revenue Court for mutation of names in her favour, that is to say she asked to be recorded as the occupancy tenant of the said holding in succession to Chikhuri whom she described as her late husband. The proprietors of the village, the appellants now before us, replied that Musammat Jinsi was a concubine and not the lawful wife of Chikhuri Ahir, and an order was passed on the 22nd of January, 1912, refusing mutation of names in favour of Musammat Jinsi. On the 18th of June, 1912, the said Musammat filed a suit in the court of the Munsif of Muhammadabad. She recited the facts already set forth, stated that she had been lawfully married to Chikhuri Ahir and that she was up to the date of the institution of the suit still in possession and occupation by right of inheritance of the entire estate left by Chikhuri. The plaint further recites that the order of the Revenue Court is calculated to cause injury to the plaintiff in future and the date of this order is referred to as the date of the origin of the cause of

(1) (1889) I. L. R., 13 All., 17. (4) (1901) I. L. R., 23 All., 300.
(2) (1896) I. L. R., 19 All., 101. (5) (1901) I. L. R., 24 All., 153.
(3) (1897) I. L. R., 19 All., 452. (6) (1913) I. L. R., 35 All., 299.

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action. The relief sought is a declaration that the plaintiff is the wedded wife of Chikhuri and rightful heir to his estate *(matruka)* The suit was resisted on a variety of pleas and more especially on the allegation that the plaintiff had been dispossessed and the land occupied by the defendants themselves as their *khud kasht* With this point however we are not concerned in the present appeal The learned Munsif fixed a number of issues but decided only two of them The point of his decision was that the suit as brought was not cognizable by a Civil Court and on this finding he dismissed the suit

In appeal this finding has been reversed by the Subordinate Judge of Ghazipur and the suit remanded to the court of first instance for trial of the remaining issues Against this order of remand the defendants have filed the present appeal In the course of argument before us the case has narrowed itself to this, whether the suit as brought is one in respect of which the cognizance of a Civil Court is barred by the provisions of section 167 of the Agra Tenancy Act (Local Act II of 1901) Under that section no court other than a Revenue Court can take cognizance of any dispute or matter in respect of which a suit or application might have been made to a Revenue Court under one or other of the articles of the fourth schedule to the said Act In group C article No 34 of the aforesaid schedule it is laid down that a suit may be brought before an assistant collector of the first class exercising jurisdiction under that Act for declaration as to any of the matters specified in section 95 of the Act Referring back to section 95 we find that at any time during the continuance of a tenancy, either the landholder or the tenant may sue for a declaration as to any of the following matters, including amongst others, (a) the name and description of the tenant of the holding (b) the class to which the tenant belongs According to Musammat Jinsi the tenancy referred to in her plaint still continues and she is in possession of this holding as an occupancy tenant in succession to her late husband It seems to us that it can scarcely be denied that on these allegations of fact Musammat Jinsi might have brought a suit for a declaration that the name and description of the tenant of the holding in question is Musammat Jinsi, widow of Chikhuri Ahir, and the class to which the said tenant belongs is

"occupancy tenant." Now it is contended before us that the suit as brought is not exactly of this description The case lies in our opinion very near the boundary, and like the learned Judges who decided the case of *Birham Khushal* v *Sumera* (1), we feel it necessary to guard ourselves against laying down that a suit for a declaration of legal status cannot be entertained by a Civil Court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant We can conceive of a plaint similar to the present but differently drafted, in which a mere declaration as to the existence of a valid marriage might have been sought and in respect of which it could scarcely have been held that the jurisdiction of the Civil Court was ousted. When we come to look at this plaint, taking notice of such circumstances as that the order of the Revenue Court of the 22nd of January, 1912 is referred to as the origin of the cause of action that no other property of the deceased Chikhuri is specified except this occupancy holding and that the relief sought is not only a declaration that the plaintiff was the wedded wife of Chikhuri but also that she was the rightful heir of his estate we think that in taking cognizance of this suit the Civil Courts would in substance contravene the provisions of section 167 of the Tenancy Act They would be taking cognizance of a dispute or matter in respect of which a suit under the Tenancy Act might have been brought On this finding we accept this appeal and setting aside the order appealed against restore the decree of the court of first instance dismissing the suit of the plaintiff respondent The defendants appellants will get their costs throughout

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RAM CHARITRA RAI v. JINSI AHIRIN

Appeal allowed

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji

1913 November 28

UMRAO SINGH (DEFENDANT) v RAMJI DAS AND OTHERS (PLAINTIFFS) *

Act No I of 1877 (Specific Relief Act) section 9—Possessory title—Suit for recovery of possession—Plaintiff in actual possession without title ousted by defendants having no title at all

Held that the purchasers of a house and site in a village who had actually held possession for some years but who had otherwise no title were entitled to

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* Appeal No 15 of 1913 under section 10 of the Letters Patent

(1) (1913) I. L. R 35 All 299

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UMRAO SINGH v. RAMJI DAS.

succeed in a suit for recovery of possession as against persons who had in fact ousted them but could show no title at all to the possession of the house or site *Wali Ahmad Khan* v *Ajudhia Kundu* (1) and *Lachman* v *Shambhu Narain* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows —

"The finding on the issue remitted by Mr Justice Piggott is that the plaintiffs have no right to occupy the house or site thereof.

"In the view which I take of this case, it was unnecessary to remit that issue and the finding on that issue does not dispose of the case The facts are that the plaintiffs in November 1891 purchased a house and site then in the occupation of one Bahadur They held possession for some years though the Judge has been unable to ascertain the precise period They were then dispossessed by the defendants who are trespassers This suit was brought on the 11th of March 1910 the plaintiffs relying on their purchase and subsequent possession and alleging that the defendants had taken the premises from them on a lease which they subsequently repudiated The defendants admitted the purchase of the premises by the plaintiffs and they pleaded that they had been in adverse possession for more than twenty years and that the plaintiffs shortly after their purchase had removed the materials of the house and abandoned the site The first court found that the defendants had not proved adverse possession for twelve years and it gave the plaintiffs a decree On appeal the District Judge dismissed the suit on the ground that Bahadur had not been entitled to the site, and all that the plaintiffs had acquired by their purchase was a right to the materials of the house The defendants have admittedly no title whatever either to the site or the house The plaintiffs were it is found in possession for some time and having regard to the nature of the property that possession must be deemed to have continued until it is proved to have been interrupted. It is not now contended that the defendants have acquired title by adverse possession. In these circumstances it seems to me that the plaintiffs are entitled to recover on the strength of their possessory title—*Wali Ahmad Khan* v *Ajudhia Kundu* (1) I was referred to the case of *Lachman* v *Shambhu Narain* (2) but that does not conflict with the previous decision in 13 Allahabad, and in that case the defendants were persons entitled to the property

"I allow this appeal set aside the decree of the court below and restore the decree of the first court with costs here and in the lower court"

The defendant appealed.

Babu *Durga Charan Banerji* (for whom Babu *Piari Lal Banerji*) for the appellant.

Mr. *A. Haidar*, for the respondents.

(1) (1891) I. L. R., 13 All., 537 (2) (1910) I. L. R 33 All. 174.

RICHARDS C. J and BANERJI J —Having regard to the circumstances of this case and to the pleadings we cannot say that it was wrong to grant to the plaintiff a decree for possession of the property in suit. We therefore dismiss the appeal with costs

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UMRAO SINGH v RAMJI DAS

Appeal dismissed

REVISIONAL CRIMINAL

1913 November 28

Before Justice Sir Pramada Charan Banerji and Mr Justice Ryves

EMPEROR v W O KEYMER *

Criminal Procedure Code section 437—Accused once tried and discharged—Fresh inquiry into the same charge on a second complaint—Jurisdiction

Held that it is competent to a magistrate who has tried and discharged an accused person on particular charges to again inquire into the same charges on a second complaint *Queen-Empress* v *Umedan* (1) followed

THE facts of the case, stated briefly were as follows One Mrs. Williams brought a complaint against Keymer charging him with cheating and criminal misappropriation in connection with the purchase of a carriage and a motor car for her. The case was tried at length, and on the 17th of March, 1913 the trying magistrate being of opinion that the charges were not made out by the evidence adduced, discharged Keymer on all the charges Some time later Mrs Williams made a fresh complaint to the police accusing Keymer of criminal misappropriation of a sum of Rs 182 which she had paid to him in connection with the purchase of the motor car This item of Rs 182 had been included in the first complaint and was dealt with at the trial ending with the order of discharge, dated the 17th of March, 1913 The police made a fresh report upon the second complaint of Mrs Williams, and the same magistrate who had discharged the accused revived the case against him. The accused applied to the High Court in revision against the order of revival

Babu *Satya Chandra Mukerji*, for the applicant —

The first complaint covered the matter of Rs 182 which is the subject of the present proceedings The accused having been tried and discharged on that complaint, and the order of discharge not having been set aside by a competent authority under section 437 of the Code of Criminal Procedure the matter cannot be revived.

* Criminal Revision No 843 of 1913 from an order of G O Byrne Joint Magistrate of Benares, dated the 8th of August, 1913

(1) Weekly Notes, 1895 p. 86

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EMPEROR v W C KEYMER.

The present case is different from a case where the first complaint is dismissed under section 203 of the Code of Criminal Procedure The case against the applicant was tried out at length and he was then discharged This case is not, therefore covered by the rulings in *Queen Empress* v *Umedan* (1) and *Emperor* v *Mehrban Husain*, (2) There is no case of this High Court which is exactly in point, but the following authorities are in my favour —*Nilratan Sen* v *Jogesh Chundra Bhuttacharjee* (3), *Komal Chandra Pal* v *Gour Chand Audhikari* (4) *Mahomed Abdul Mennan* v *Panduranga Row* (5) and *Queen Empress* v *Adam Khan* (6)

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown —

There is nothing to prevent the same magistrate who has dismissed a complaint or discharged an accused person from reopening the case on a fresh complaint or a fresh police report He can do so even without any fresh complaint Section 437 does not bar such action on the part of the Magistrate The point is covered by authority, and there is no essential difference, as far as this point is concerned, between a case where the complaint is dismissed under section 203 of the Code of Criminal Procedure and a case where the accused person is discharged I rely on the following authorities —*Queen Empress* v *Umedan* (1), *Emperor* v *Mehrban Husain* (2) *Dwarka Nath Mondul* v *Beni Madhab Banerjee* (7) *Mir Ahmad Husain* v *Mahomed Askari* (8) and *Emperor* v *Chinna Kaliappa Gounden* (9) The case in I L R., 22 All, cited by the applicant, was different There, a complaint was dismissed by one magistrate and then another magistrate of co-ordinate powers re opened the same matter

BANERJI and RYVES, JJ —Mrs Williams lodged a complaint against W C Keymer, charging him with several offences in connection with the purchase of a phaeton and a motor car The case was tried at length by a magistrate of the first class, who, on the 17th of March, 1913, passed an order of discharge on all the

(1) Weekly Notes, 1895 p 80
(2) (1906) I L R 29 All 7
(3) (1896) I L R, 23 Calc, 983
(4) (1897) I. L. R., 24 Calc, 286
(5) (1901) I L. R. 28 Mad., 255
(6) (1899) I L R, 22 All, 106.
(7) (1900) I. L. R., 28 Calc, 652
(8) (1902) I. L R., 29 Calc, 726.
(9) (1905) I. L R., 29 Mad, 126

charges Subsequently Mrs Williams complained to the police with reference to an item of Rs 182 which she had paid to Keymer in connection with the purchase of a motor car and which she charged him with criminally misappropriating The case was re-instated in the court of the same magistrate who had already passed the order of discharge as stated above In this second case he has taken some evidence on behalf of the prosecution and framed a charge This court was then moved in revision on the ground that it was not open to the Magistrate having once discharged the accused, to again inquire into the same charge on a second complaint It seems to us that we are bound by the ruling in *Queen Empress* v *Umedan* (1) That ruling completely covers the facts of this case and it has been followed more than once in this Court That no doubt was a case of the dismissal of a complaint under section 203 of the Code of Criminal Procedure but in our opinion the principle is the same and applies to this present case We think therefore, that the Magistrate had jurisdiction We think however, that the more appropriate tribunal to decide this case is a civil court The application is rejected With these observations we direct the record to be returned for disposal

Application rejected

APPELLATE CIVIL.

Before Mr Justice Ryve and Mr Justice Piggott

1913 *December 2*

BADRI KASAUNDHAN (DEFENDANT) v SARJU MISR (PLAINTIFF) AND BINDESRA KUNWAR AND OTHERS DEFENDANTS) *

Act (Local) No II of 1901 *(Agra Tenancy Act) section* 167 *schedule IV Group C No* 30*—Civil and Revenue Courts—Jurisdiction—Suit by reversionary heir on death of Hindu widow to recover a holding*

The widow and son's widow of a separated Hindu being in possession as such of a fixed rate holding which had belonged to their late husband and father in law sold the same to a *mahajan* who in turn sold it to the zamindar

Held on suit brought by the reversionary heir of the late tenant some three years after the last widow's death for recovery of possession of the holding (1) that the suit was of the nature contemplated by section 167 and schedule IV Group C No 30 of the Agra Tenancy Act 1901 and would not lie in a Civil

* First Appeal No 104 of 1913 from an order of V N Mehta Subordinate Judge of Jaunpur, dated the 4th of July 1913

(1) Weekly Notes 1895 p 86

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BADRI KASAUNDHAN v SARJU MISR

Court and (2) that the suit was therefore barred by limitation. *Ram Lal* v *Chunni Lal* (1) referred to

THE facts of this case were as follows —

The plaintiff alleged that he was the next reversioner of one Ramphal, who was a tenant at fixed rates of a certain holding He died, leaving him surviving his widow and a widow of a pre deceased son. These ladies continued in possession of this holding and were entitled to a Hindu widow's estate therein They then sold the holding to a *mahajan* who in turn sold it to the zamindars Subsequently the widows died The plaintiff, three years after the death of the last widow, brought this suit in a Civil Court for possession of the holding and for mesne profits It was pleaded that the suit was not cognizable by a Civil Court and that it was barred by limitation, because in order to decide the jurisdiction of the court to hear the suit and to ascertain the period of limitation applicable the allegations of the plaint and not the nature of the defence set up were to be considered The Munsif fixed various issues, but tried one only that of limitation and holding the suit barred as having been brought more than six months after the widow s death dismissed it On appeal this find ing was reversed The appel ate court held that the rule of limi tation applicable was twelve years and remanded the suit for decision on the other issues One of the defendants appealed from that order of remand

Munshi *Girdhari Lal Agarwala* for the appellant

Munshi *Kalindi Prasad* for the respondents

RYVES and PIGGOTT, JJ —The facts of this case as disclosed in the plaint may be concisely stated thus so far as is necessary for the purpose of this appeal The plaintiff alleged that he was the next reversioner of one Ramphal who was a tenant at fixed rates of a certain holding He died leaving him surviving his widow and a widow of a pre deceased son These ladies continued in possession of this holding and were entitled to a Hindu widow's estate therein They then sold the holding to a *mahajan* who in turn sold it to the zamindars Subsequently the widows died The plaintiff three years after the death of the last widow brought this suit in a Civil Court for possession of the holding and for mesne profits. It is unnecessary to set out the defence

(1) (1905) 2 A. L. J 69

beyond stating that it was pleaded that the suit was not cognizable by a Civil Court and that it was barred by limitation, because in order to decide the jurisdiction of the court to hear the suit and ascertain the period of limitation applicable the allegations of the plaint, and not the nature of the defence set up, are to be considered. The learned Munsif fixed various issues, but tried one only, that of limitation, and holding the suit barred, as having been brought more than six months after the widow's death, dismissed it. On appeal this finding was reversed. The appellate court held that the rule of limitation applicable was twelve years and he remanded the suit for decision on the other issues.

The defendant has appealed from that order of remand. It is quite clear that if the Civil Courts have jurisdiction then the twelve years' rule is applicable, but it is equally clear that if the plaintiff could have obtained his remedy in the Revenue Courts then his suit is admittedly barred

The test seems to be to ascertain what in substance and reality is the relief sought If that relief could have been obtained on a properly worded plaint presented to a Revenue Court then the jurisdiction of a Civil Court is barred

To apply this test in the present case What is the real remedy the plaintiff seeks? To obtain possession of a tenancy at fixed rates Against whom does he seek this relief? The zamindars On what grounds? That he is the reversionary heir of the last tenant, that on his death he sought to obtain possession, but was obstructed by the zamindars Under these circumstances a suit under Group C, No 30 of Schedule IV of the Tenancy Act would seem applicable, and if so, the suit ought to have been brought in the Revenue Court within six months from the date of dispossession.

We think it important to maintain for the benefit of tenants who are involved in disputes of any kind with the landlord, the swift and comparatively inexpensive remedy provided by a suit under the Tenancy Act wherever the provisions of that Act seem reasonably applicable

The case of *Ram Lal* v *Chunni Lal* (1) is not quite on all fours with the present case, but it shows that the provisions of section 79 of the Tenancy Act apply to cases where there has been

(1) (1905) 2 A. L. J., 69

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BADRI KASAUNDHAN v. SARJU MISR

a constructive as well as an actual or physical ejectment of the plaintiff from his tenancy. The principle underlying that ruling seems to be, that where a person claiming to have succeeded to a tenancy by right of inheritance finds that, on endeavouring to take possession of the same, his right is denied and his possession ousted by the zamindar, he has suffered an ejectment at the hands of the landlord within the meaning of the section, and his appropriate remedy is by a suit under the Tenancy Act as indicated above. For these reasons we allow this appeal, set aside the order of the lower appellate court and restore the decree of the court of first instance with costs throughout

Appeal allowed.

1913
December, 2

Before Sir Henry Richards, Knight Chief Justice, and Mr Justice Tudball

DALIP SINGH AND OTHERS (DEFENDANTS) v KUNDAN SINGH AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908), *section* 104, *order XLIII, rule* 10 (*a*)—*Order of appellate court returning plaint for presentation to the proper court—Appeal —Act No VII of* 1887 (*Suits Valuation Act*), *section* 11

Held that an appeal lies under the Code of Civil Procedure, 1908 as it did under the former Code, from an order returning a plaint to be presented to the court *Wahidullah* v *Kanhaya Lal* (1) followed

Where, however, such an order is to be made by an appellate court, it is the duty of such court first to consider whether the over valuation or under valuation of the suit has prejudicially affected its disposal on the merits and thereafter to take action in the manner prescribed by section 11 of the Suits Valuation Act, 1887

THE facts of the case were as follows —

A suit for pre emption was brought in the court of Munsif by the plaintiffs respondents They sought possession of certain property, the value of which they gave as Rs 800 There were many defences, but, amongst other objections taken by the defendants, it was urged that the real value of the property was Rs. 1,500 and the Munsif's court had no jurisdiction to entertain the suit The Munsif framed all the issues in the case, took evidence thereon, held that the value of the property was Rs 1,500, but in spite of that proceeded to decide all the issues and dismissed the suit The right to pre empt was based

*First Appeal No 157 of 1913 from an order of Banke Behari Lal, Second Additional Judge of Aligarh, dated the 14th of June, 1913

(1) (1902) I L R., 25 All., 174

on village custom, and he held that the custom did not exist. The plaintiffs appealed, urging that the custom of pre emption did exist and that the true value of the property was Rs 800 The lower appellate court decided that the value of the property was Rs 1,500 It, thereupon, without deciding any other point, set aside the decree of the first court and directed the plaint to be returned to the plaintiffs for presentation in the proper court

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DALIP SINGH v. KUNDAN SINGH

Against this order the defendants vendees appealed to the High Court

Munshi *Govind Prasad*, for the appellants

Mr *D R Sawhny*, for the respondents

RICHARDS, C J, and TUDBALL, J —This appeal arises out of a suit for pre-emption which was brought in the court of the Munsif by the plaintiffs respondents They sought possession of certain property, the value of which they gave as Rs 800 There were many defences, but amongst other objections taken by the defendants, it was urged that the real value of the property was Rs 1,500 and the Munsif's court had no jurisdiction to entertain the suit The Munsif framed all the issues in the case, took evidence thereon, held that the value of the property was Rs 1,500, but in spite of that proceeded to decide all the issues and dismissed the suit The right to pre empt was based on village custom, and he held that the custom did not exist The plaintiffs appealed, urging that the custom of pre emption did exist and that the true value of the property was Rs 800 The lower appellate court decided that the value of the property was Rs. 1,500 It, thereupon, without deciding any other point, set aside the decree of the first court and directed the plaint to be returned to the plaintiffs for presentation in the proper court

The defendants have come here on appeal from this order, and it is urged that the lower appellate court should have taken action under section 11 of the Suits Valuation Act and ought not to have returned the plaint as it has done A preliminary objection is taken that no appeal lies to this Court from the order of the lower appellate court directing the plaint to be returned The point is one which was considered by a Full Bench of this Court in *Wahid ullah* v *Kanhaya Lal* (1) The present Code has made

(1) (1902) I L R 25 All, 174

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DALIP SINGH v KUNDAN SINGH

no alteration in this respect, and in accordance with that ruling it is clear that an appeal does lie to this Court That case, moreover, is in other respects parallel to the case before us It was therein pointed out that in circumstances such as those of this case, it was the duty of the lower appellate court to take action under clause (2) of section 11 of Act No VII of 1887 The lower appellate court, having come to the conclusion that the valuation was Rs 1,500 ought to have at once considered the question whether or not the under valuation had prejudically affected the disposal of the suit (Under the circumstances of this case this is not likely to have happened) If the lower court had then found that the parties had not been prejudically affected and the materials necessary for the decision of the suit were on the record (as they appear to be), it was clearly its duty to dispose of the appeal as if there had been no defect of jurisdiction in the court of first instance We agree with, and are bound by, the ruling in the Full Bench decision mentioned above, and, as in that case, we set aside the order of the lower appellate court and remand the case for disposal by it, having due regard to the provisions of the Suits Valuation Act as mentioned above The costs of this appeal will abide the event

Appeal decreed and cause remanded

1913
December, 3

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

KAMTA PRASAD AND OTHERS (DEFENDANTS) v RAM JAG AND OTHERS (PLAINTIFFS) *

Pre-emption—Wajib ul arz—*Resale of property during pre emption suit to person with a preferential right, but after extinction of his right to pre empt by reason of limitation*

During the pendency of a suit for pre emption under the provisions of the village wajib-ul arz the vendee resold the property in suit to a person who originally had a pre-emptive right superior to that of the plaintiff but who at the date of the sale was barred by limitation from enforcing it *Held* that the plaintiff's claim was not defeated by such sale. *Manpal* v *Sahib Ram* (1) *Janki Prasad* v *Ishar Das* (2) and *Ram Gopal* v *Piari Lal* (3) distinguished

IN this case certain property, which was subject to pre-emptive rights under the provisions of the village wajib ul arz was sold to

* Second Appeal No. 195 of 1913 from a decree of Soti Raghubans Lal, District Judge of Mirzapur, dated the 9th of October, 1912, modifying a decree of Udit Narain Sinha, Subordinate Judge of Mirzapur, dated the 20th December, 1911

(1) (1905) I.L.R., 27 All., 544 (2) (1899) I.L.R., 21 All., 374 (3) (1899) I.L.R., 21 All., 441.

a stranger on the 2nd of May, 1910 A suit for pre emption was instituted by a co-sharer on the 2nd of May, 1911. On the 4th of May, 1911, the vendee resold the property to one Kamta Prasad, who was not only a co sharer with the vendor but a relative, and who would on that account have enjoyed a right of pre emption superior to that of the plaintiff The court of first instance decreed the plaintiff's claim The lower appellate court modified the decree of the first court. The present appeal was preferred by Kamta Prasad.

Mr *M L Agarwala* and Munshi *Kalindi Prasad*, for the appellants

Babu *Jogindro Nath Chaudhri* and Babu *Sarat Chandra Chaudhri*, for the respondents

RICHARDS, C J and TUDBALL J—This appeal arises out of a suit for pre-emption The sale in respect of which the plaintiffs brought their suit took place on the 2nd of May, 1910 The suit was instituted on the 2nd of May, 1911 On the 4th of May, 1911, the vendee re sold the property to Kamta Prasad the appellant For the purposes of the present appeal it must be assumed that a custom of pre emption as set forth in the plaint (paragraph 2) prevails in the mahal in which the property is situated. The original vendee was a stranger The plaintiff is a co-sharer with the vendor, but the appellant, Kamta Prasad, is not only a co sharer but a relative We must take it, therefore, that Kamta Prasad had a superior right of pre emption at the time of the sale over the plaintiffs The real question in the appeal is whether or not the mere fact that the property was resold to Kamta Prasad on the 4th of May 1911 defeats the right of the plaintiffs to pre empt this property

We think that the question really depends upon what was the custom prevailing in the mahal In ordinary language the custom was to the effect that the vendor was bound when he contemplated selling the property in the first place to offer it to Kamta Prasad If Kamta Prasad refused to purchase, he should offer it to the plaintiffs. If the plaintiffs refused to purchase, then he was at perfect liberty to sell it to a stranger In our opinion Kamta Prasad having taken no steps of any kind to enforce his rights until after the period of limitation had expired, is in no better position

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KAMTA PRASAD v RAM JAG

than he would have been had the property been expressly offered to him and he had refused to buy it We think it can hardly be contended that if this had taken place it would be in accordance with the custom that he could afterwards have changed his mind and defeated the claim of the plaintiffs

Reliance has been placed on the case of *Manpal* v *Sahib Ram* (1) In that case the circumstances were very similar to the circumstances of the present case, but the appeal had been referred to a Full Bench on a question arising under section 52 of the Transfer of Property Act This question was never decided by the Full Bench The learned Chief Justice says at page 546 —" This appeal was referred to a Full Bench by two of us on the representation that it involved the determination of the vexed question of the true construction of section 52 of the Transfer of Property Act At the close of a lengthy argument Pandit Sundar Lal on behalf of the respondent raised a point which appears to us to be fatal to the appeal and it is not necessary having regard to the view which we take upon that point to determine the main question, which has been discussed before us at very great length."

The learned Chief Justice then proceeds to point out that after the suit had been instituted the plaintiff amended his proceedings by adding the second vendee as a party to the suit alleging that he had a preferential right as against him and also that the sale was fictitious At page 548 the judgement proceeds — We are clearly of opinion that in a case such as the present the circumstances being as we have described a defendant having been added who had at the time a right to maintain a suit for pre emption based upon his preferential claim and the question of preferential claim having been determined in the suit it does not lie in the mouth of the plaintiff to object to the finding upon the issue raised at his invitation and to say that the court is to disregard it "

It seems absolutely clear that the judgement in this case proceeded on a misapprehension of the facts We have sent for the paper book and we find that the added defendant had no right to maintain a suit for pre emption at the date upon which he was added nor even on the date upon which the sale was made to him Thus the whole reasoning upon which the case was decided falls to the ground In the present case if we apply

(1) (1905) I L R 27 All, 544

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the principle laid down by the Full Bench we find that Kamta Prasad had no right to maintain a suit for pre emption on the date upon which the sale was made to him or on the date upon which he was added as a defendant to the proceedings

We have been referred to the case of *Janki Prasad* v *Ishar Das* (1) This case does not assist the appellant It only decided that it was necessary that a plaintiff in a pre emption case should have a right to maintain his suit not only on the date of the sale but on the date on which the suit was instituted

We were also referred to the case of *Ram Gopal* v *Piari Lal* (2) This case was decided on its own facts and circumstances There the plaintiff had ceased to be a co sharer by partition at the time the court was called upon to make a decree in his favour In the present case the plaintiff was a co-sharer at the date of the sale to the original vendee He continued to be a co-sharer right up to the time that the decree was made in his favour Under these circumstances we consider that the decree of the court below was correct and ought to be confirmed We accordingly dismiss the appeal with costs

Appeal dismissed

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

1913 December 3

PARTAB SINGH AND OTHERS (PLAINTIFFS) v DAULAT AND OTHERS (DEFENDANTS)*

Pre-emption—Claim based on relationship to vendor—Death of plaintiff pending suit—Sons of plaintiff not entitled to take advantage of the relationship of their father

The plaintiff in a suit for pre emption had a preferential right over the vendee on the ground of his nearer relationship to the vendor but the plaintiff s sons had not *Held* that the plaintiff s sons could not, on the death of their father pend ng the suit claim to take advantage of the relationship in which their father had stood to the vendor

THIS was a suit for possession by right of pre emption The suit was instituted by a person who by reason of his nearness of relationship to the vendor possessed a superior pre-emptive right to that of the vendee, but during the pendency of the

* Second Appeal No 272 of 1913 from a decree of Ganga Sahai Second additional Subordinate Judge of Moradabad, dated the 7th of December, 1912, confirming a decree of Harihar Prasad, Munsif of Haveli, dated the 23rd of April, 1912

(1) (1899) I L R., 21 All, 374 (2) (1899) I.L R, 21 All, 441.

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PARTAB SINGH v. DAULAT

suit he died. His sons were brought upon the record as plaintiffs They themselves were not nearer relations to the vendor than was the vendee, but they claimed the advantage of the relationship possessed by their father The defendants pleaded that the substituted plaintiffs had no perferential right as against them The courts below dismissed the claim. The plaintiffs appealed to the High Court.

The Hon'ble Dr *Tej Bahadur Sapru*, for the appellants, submitted that Dal Chand pre-emptor died during the pendency of the suit and his heirs were brought on the record. Dal Chand claimed a priority over the defendant vendee as he was a nearer relative of the vendor, and his sons stood in his shoes and could also claim priority A son was entitled to succeed to all the property of his father and the right to pre-empt was also a species of property The fact that the sons stood on exactly the same footing as the vendee would not deprive them of the right which devolved upon them through the father The following cases were referred to during the argument— *Wajid Ali Khan* v *Shaban* (1) *Muhammad Yusuf Ali Khan* v *Dal Kuar* (2) and *Kaunsilla Kunwar* v *Gopal Prasad* (3)

Mr *D R Sawhny*, for the respondent, submitted that the matter was concluded by *Ram Gopal* v *Peari Lal* (4) The right of pre-emption was a purely personal right, and the son not being a nearer blood relation himself could not succeed as against the vendee. He might only inherit the right to maintain the suit but not to any thing else The right of the plaintiff must subsist at the date of the decree, *Tafazzul Husain* v *Than Singh* (5)

The Hon ble Dr *Tej Bahadur Sapru* was heard in reply

RICHARDS, C J and TUDBALL J—We think, having regard to the fact that the appellants could not have maintained the suit as against the vendees had they instituted the suit themselves, they cannot take advantage of the fact that their father at the time of the suit had a preferential right as against the vendees on the ground that he was a nearer relation. We accordingly dismiss the appeal with costs.

Appeal dismissed

(1) (1909) I. L. R. 31 All., 623

(2) (1897) I. L. R., 20 All. 148.

(3) (1906) I. L. R., 28 All., 424

(4) (1899) I. L. R., 21 All., 441

(5) (1910) I. L. R., 32 All., 567

Before Mr Justice Ryves and Mr Justice Piggott.

1913
December, 17

HASHMAT BIBI (OBJECTOR) v. BHAGWAN DAS AND OTHERS (OPPOSITE PARTIES)*
(and two other appeals consolidated)

Act No III of 1907, (Provincial Insolvency Act), sections 13(3), 47—Attachment of property as that of insolvent before adjudication of insolvency—Civil Procedure Code (1908), order XXI, rule 58, order XXXVIII, rules 5 to 12—Procedure—Appeal.

Where certain property was attached under section 13 (3) of the Provincial Insolvency Act, 1907, by a court exercising jurisdiction under that Act, before the petitioner was declared an insolvent and a receiver appointed, it was *held* that the court was bound to hear and adjudicate upon any claims which might be preferred by persons alleging themselves to be in fact the owners of such property Procedure under section 13 (3) of the above mentioned Act was analogous to attachment before judgement under the Code of Civil Procedure It might have been open to the objectors to wait until the receiver had taken some action in respect of the property attached and then to apply under section 22 of the Act but this they were not bound to do.

THE facts of this case were as follows:—

One Karim Bakhsh applied to be declared insolvent. Bhagwan Das and others filed objections opposing the insolvency on the grounds that the applicant had transferred his property in bad faith to his wife on the 11th of July, 1906, and that he had not set forth all his property in the schedule, having omitted to mention property purchased in the name of his son, Abdul Ghani, on the 16th of July, 1900. The Judge called for certain reports from the amin, but ordered the said property to be immediately attached, holding it to be the applicant's property, and appointed the amin to be the receiver. The wife and the son were no parties to the application Thereupon the wife and the son put in applications praying the court to re-consider its order, and give them an opportunity of establishing their claim. The Judge dismissed the applications, holding that he had no jurisdiction to hear the applications The objectors appealed both against the order directing the property to be attached and the orders dismissing their applications. The former was numbered F A F.O, No 169 of 1913 and the latter Nos. 170 and 171 of 1913

Pandit *Vishnu Ram Mehta*, for the respondents, took a preliminary objection to the effect that no appeal lay from an order making an attachment before judgement under the Provincial Insolvency Act.

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* First Appeal No 170 of 1913 from an order of L Marshall, District Judge of Jaunpur, dated the 22nd of February, 1913.

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Hashmat Bibi v. Bhagwan Das.

Dr. *S. M. Sulaiman*, for the appellants, having pointed out that under section 46 (3) of the Provincial Insolvency Act an appeal was allowed against every order provided leave was obtained, the Court proceeded to hear the appeal.

The Judge had jurisdiction to hear the application. He could not order a person to be dispossessed without giving him an opportunity to be heard. The court has inherent power to entertain such objections. Section 47 of the Provincial Insolvency Act gives the court powers which it has under the Code of Civil Procedure. Attachment under section 13 (3) of the Provincial Insolvency Act is an order similar to attachment before judgement under the Code of Civil Procedure. The procedure applicable to such attachments is the same as laid down in order XXI. (See order XXXVIII, rules 7 & 8.) Rule 58 of that order gives the court power to entertain and investigate objections, and I submit the Court is bound to do so. The Judge must be satisfied that the property was under the control and management of the debtor and he having failed to do so in this case his order is wrong. The effect of this order would be that the applicants would have no remedy.

Pandit *Vishnu Ram Mehta*:

The order of the Judge in attaching the property and ordering the amin to make a report amounted to an order appointing a receiver. The moment a receiver was appointed the property vested in him and the applicant ought to have waited till the receiver did something against his interest: *Mul Chand* v. *Murari Lal* (1). Even then he could only proceed under section 22 of the Insolvency Act. This was not an order in execution. Order XXI, rule 58, did not apply, and even if it was applicable the aggrieved party would have no right of appeal. His only remedy is by a separte suit. He cannot even come in revision.

Dr. *S. M. Sulaiman*, for the appellants, was not called upon to reply.

Ryves and Piggott JJ:—These are three connected appeals arising out of insolvency proceedings. Karim Bakhsh applied to the District Judge of Jaunpur on the 28th of August, 1912, for an order adjudicating him an insolvent. While the application was under inquiry the District Judge received

(1) (1913) I. L. R., 36 All., 8.

information on the strength of which he came to the conclusion that Karim Bakhsh *had failed to disclose, or was* attempting to conceal, certain immovable property belonging to him. He accordingly passed an order under section 13 (3) of the Provincial Insolvency Act for the attachment of the said property, *viz* shares in a tiled house and courtyard and in certain trees, a zamindari share and a portion of a fixed rate holding, as being property in the possession or under the control of Karim Bakhsh. This was on the 4th of February, 1913 On the 8th of February, 1913, an order adjudicating Karim Bakhsh to be an insolvent was passed and a receiver was appointed On the 12th of February, 1913, two persons, *viz*, Hashmat Bibi, wife of Karim Bakhsh, and Abdul Ghani, minor son of Karim Bakhsh, presented separate applications to the District Judge, claiming the property attached in pursuance of the order of the 4th of February, 1913, as their own property These petitions of objection referred to order XXI, rule 58, of the Code of Civil Procedure and purported to be made under that rule read with section 47 of the Provincial Insolvency Act (Act III of 1907) Each of these applications was rejected by the District Judge on the ground that the provisions of order XXI, rule 58, aforesaid had no application and that the only remedy open to the petitioners was either by separate suit, or by appeal against the order of attachment Three appeals have accordingly been presented to this Court One is by Hashmat Bibi and Abdul Ghani jointly against the order of the 4th of February, 1913, directing the attachment of the property in question The other two appeals are by Hashmat Bibi and Abdul Ghani separately against the orders of the 22nd of February, 1913, dismissing the objections filed by them on the 12th of February, 1913 These appeals have been admitted by special leave of this Court, under section 46 of Act III of 1907 The Provincial Insolvency Act lays down no procedure to be followed by the court when effecting an attachment According to section 47, therefore, the court must follow the same procedure as it would do in the exercise of its original civil jurisdiction, and must also exercise the same powers Now an attachment under section 13(3) of the Provincial Insolvency Act is strictly analogous to an attachment before judgement effected under order XXXVIII, rules 5 to 12, of

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HASHMAT BIBI v. BHAGWAN DAS

the Code of Civil Procedure. According to order XXXVIII, rule 8, of the Civil Procedure Code a claim may be preferred to property attached before judgement, and the court is thereupon bound to investigate such claim in the manner provided for the investigation of claims to property attached in execution of a decree for payment of money This refers us back to order XXI, rule 58, of the Civil Procedure Code In our opinion therefore, the District Judge was bound to entertain the objections put forward by Hashmat Bibi and Abdul Ghani and to hold an investigation as to the validity of the claims put forward by them to the ownership of the property attached. The necessity for doing this at some stage or other of the proceedings is apparent when we consider that, by reason of section 16 (2) of the Provincial Insolvency Act the property in question vested in the receiver from the date of his appointment if in fact it was the property of the insolvent, but did not so vest if it was the property of Hashmat Bibi and Abdul Ghani. It has been suggested before us that, for this very reason, the present appellants might have waited until the receiver proceeded to take some action by way of realizing this property for the benefit of Karim Bakhsh s creditors and then might have appealed against the receiver under section 22 of Act No III of 1907 We take note of this argument only to point out that this is a course which was apparently open to these appellants but it does not follow that they had no right to question the order of attachment itself We think for the reasons already given that they have this right and that their petitions of the 12th of February, 1913 should not have been rejected without inquiry We accordingly accept the appeals Nos 170 and 171 now before us, set aside the orders complained against in those appeals, and direct the District Judge to re-admit the petitions of Hashmat Bibi and Abdul Ghani on to his file of pending applications and to dispose of them The costs of these appeals will abide the event.

As regards Appeal No 169 of 1913 we think it must be formally dismissed, on the ground that the District Judge had before him sufficient *primâ facie* reason for directing the attach ment by his order of the 4th of February, 1913 The parties will bear their own costs of this appeal.

Appeal Nos 170,171 *allowed*
Appeal No 169 *dismissed*

FULL BENCH.

1913
December, 1

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr Justice Ryves

LUTAWAN AND OTHERS (PLAINTIFFS) *v* LACHYA AND OTHERS (DEFENDANTS) *

Civil Procedure Code (1908), schedule II, articles 15 and 16; order XXXII, rule 7—Arbitration—Agreement by guardian ad litem *of minor party to refer—No objection taken to validity of award—Decree in accordance with award—Appeal.*

Where an objection to the validity of an award, which might have been raised under article 15 of the second schedule to the Code of Civil Procedure, is not raised within the time limited, or, being raised, is rejected, and the court proceeds to pronounce judgement and to frame a decree, no appeal will lie except on the grounds stated in article 16 of the same schedule So *held* by RICHARDS, C. J and BANERJI and RYVES, JJ.

Semble (*per* RICHARDS, C J, and RYVES, J) that order XXXII, rule 7, of the Code of Civil Procedure, 1908, does not control article 1 of the second schedule. It is not therefore necessary for the guardian of a minor party to obtain the express leave of the court before agreeing to a reference to arbitration being made by the court.

Ghulam Khan v. *Muhammad Hassan* (1) and *Hardeo Sahai* v *Gauri Shankar* (2) referred to. *Lakshmana Chetti* v *Chinnathambi* (3) distinguished

THE facts of this case were as follows :—

During the pendency of the suit an application was made by all the parties, including minors, to refer the matter to a named arbitrator and order of reference was made. No application was made for leave to refer the matter on behalf of the minors. The arbitrator made an award and filed it. Objections were taken to the award but were overruled and a decree was made in accordance with the award. In appeal the objector set up a new plea as to the invalidity of the award on the ground that, as no leave of court had been obtained on behalf of the minors, there was no legal reference and no legal award. The court set aside the decree upon this ground. The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal*, for the appellants :—

The only ground on which the lower appellate court has set aside the award and the decree based thereupon was that the sanction of the court had not been obtained to the making of

* First Appeal No. 35 of 1913 from an order of L Marshall, District Judge of Jaunpur, dated the 4th of December, 1912.

(1) (1901) I L R, 29 Calc, 167. (2) (1905) I L R., 28 All., 35.
(3) (1900) I L R, 24 Mad., 326

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the submission to arbitration under rule 7, order XXXII of the Code. It had been definitely ruled by this Hon'ble Court under the corresponding section 506 of Act XIV of 1882, that no such sanction was required in such a case. Following the practice settled by that ruling, the parties did not apply for such sanction. No such sanction is necessary in law. If the parties unanimously move the court to make the reference, such unanimous action, though reduced to the form of a petition in writing signed by them all is not an "*agreement*" of the nature mentioned in rule 7, order XXXII. If it were so every motion by 'consent' including one for the adjournment of a case would be an agreement to which the sanction of the court would be necessary. It is the court which makes the reference, after satisfying itself that all the parties interested *agree* in such reference being made Any facts antecedent to the reference affecting its validity should have been made the subject of an objection under paragraph 15 of schedule II of the Code The words "*or being otherwise invalid*" added to sub-clause (3) of that paragraph, were intended to cover all possible objections of any kind to the award. The intention of the Code as now amended was that all objections to the award should be made to the court making the reference, whose decision on the validity of the award was to be final. The decree on the award was final under paragraph 16 of schedule II. Any objection not made to that court or if made to that court and rejected by it, could not be considered in appeal: *Ghulam Khan* v. *Muhammad Hassan* (1), *Hansraj* v. *Sundar Lal* (2), *Shib Kristo Daw & Co* v. *Satish Chandra Dutt* (3) and *Kanakku Nagalinga Naik* v. *Nagalinga Naik* (4). It was not open to the lower appellate court to entertain an appeal, and to reconsider the decision of the court of first instance.

Munshi *Haribans Sahai*, followed on the same side

Mr. *Hameed-ullah*, for the respondents.

The reference to arbitration was bad; there being minors on both sides the permission of the court was necessary, and it was not granted to either side. In cases where minors are concerned it is the duty of the court itself to see that all legal requirements

(1) (1901) I. L. R., 29 Calc., 167.
(2) (1908) I. L. R., 35 Calc., 648.
(3) (1912) I L R, 39 Calc., 822.
(4) (1909) I L R, 32 Mad., 510.

are fulfilled, even when the parties do not call the court's attention The reference being bad in law, there was no proper arbitration No valid and legal award was passed which could form the basis of a decree and against which the law gives no appeal Also the words of the present decree go beyond the words and spirit of the so-called award No minor can be blamed for not filing objections to the reference on the award in the court of first instance The defects in the wording of the decree could only be discovered later on and a higher court of law is not precluded from entertaining an appeal Reference was made to sections 462 506 and 521 of the Code of Civil Procedure 1882 and to the Code of 1908 order XXXII, rule 7, and schedule II, articles 15 and 16, also to *Lakshmana Chetti* v *Chinnathambi Chetti* (1)

RICHARDS C J —This appeal arises out of a suit to recover possession of a house The claim was only valued at the small sum of Rs 43 4 0 Amongst the array of parties were minors on both sides who were represented in the suit by their respective guardians During the course of the litigation an application was made in writing by all the parties that the matters in dispute should be referred to the arbitration of a named arbitrator In pursuance of this application the court made an order of reference The arbitrator took upon himself the burden of the arbitration and made an award Objections were filed on behalf of the defendants to the award The objections were six in number, relating to the conduct of the arbitrator and his alleged refusal to hear the evidence offered by the parties and other matters No objection was taken that the leave of the court was not obtained prior to the order of reference and it is quite clear that no such matter was ever brought under the notice of the court which had made the order of reference The learned Munsif heard the various objections and having overruled them made a decree in accordance with the award An appeal was preferred to the District Judge by the defendants and there for the first time it was objected that the leave of the court had not been obtained prior to the reference and it was contended on these grounds that there was no valid reference and therefore no valid award and that an appeal lay The learned District Judge accepted this contention

(1) (1900) I L R 24 Mad 326

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and set aside the decree and the award and remanded the case. Hence the present appeal.

Arbitration proceedings are now governed by the second schedule to the Code of Civil Procedure. The first paragraph provides as follows :—

Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgement is pronounced, apply to the court for an order of reference.

Clause (2) is as follows :—

" Every such application shall be in writing and shall state the matter sought to be referred."

This provision corresponds to section 506 of the Code of Civil Procedure of 1882, the only difference being that in section 506 the words are as follows :—

" If all the parties to a suit desire that any matter in difference between them be referred to arbitration, they may "

The schedule then provides for the order of reference, the appointment of arbitrators and other matters. Paragraph 15 provides that no award shall be set aside except on one of the grounds specified :

(1) " Corruption or misconduct of the arbitrator or umpire "

(2) " Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire "

(3) " The award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court, or being otherwise invalid "

The words " or being otherwise invalid " have been introduced into the present Code and were not in the Code of 1882. Paragraph 16 provides :—

" Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the court has refused such application, *the court shall, after the time for making such application has expired, proceed* to pronounce judgement according to the award."

Clause (2) provides :—

" Upon the judgement so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award."

It is contended on behalf of the appellants, first, that the matter in dispute which should be referred to arbitration is not an agreement within the meaning of order XXXII, rule 7, of the Code of

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Civil Procedure requiring the leave of the court It is further argued that, even if such an agreement was an agreement within the meaning of order XXXII, rule 7, the fact that leave was not obtained does not give a right of appeal It was a matter which the court which had made the order of reference could have considered, if it had been properly brought before it as being a ground on which the award was "otherwise invalid"

In support of the appellant's first contention the case of *Hardeo Sahai* v *Gauri Shankar* (1) was relied upon In that case it was expressly decided that it was unnecessary to obtain the leave of the court before making an application to refer under Chapter XXXVII of the Code of Civil Procedure The learned Judges say (at page 36) — "In the first place we do not think that section 462 has any application to the proceedings provided for by Chapter XXXVII of the Code, that is to arbitration proceedings, which are special proceedings This no doubt, is an authority in favour of the appellant's contention There is a slight change in the wording of paragraph 1 of the second schedule which I have already referred to The words in section 506 are

"If all the parties to a suit *desire* that any matter in difference between them be referred to arbitration"

while in paragraph 1 of the second schedule the words are

"Where in any suit all the parties interested *agree* "

I do not think that much weight can be given to this verbal alteration in the provisions of the Code It is not the parties who refer It is the court which makes the order of reference, and at the present time, just as under the old Code all that the parties do is to agree to make an application to the court asking it to make an order of reference

The appellants also *rely on the case of Ghulam Khan* v *Muhammad Hassan* (2) This was a decision of their Lordships of the Privy Council in which their Lordships express a strong opinion in favour of the finality of awards Exactly the same point had been taken as a ground for revision in the Punjab Chief Court as is raised in the present appeal namely that the leave of the court had not been obtained prior to the application for an order of reference Sir William Rattigan, who appeared for the

(1) (1905) I L R 28 All, 35 (2) (1901) I L R 29 Calc, 167

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appellants, expressly took the ground that the reference to arbitration was an agreement within the meaning of section 462 and that the leave of the court ought to have been obtained under that section Their Lordships do not specifically deal with this ground of objection. They, however, make the following remark — "Inasmuch as their Lordships hold that the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court It is enough to say that in their Lordships' opinion there does not appear to have been any substance in any one of them" It is not easy to say that their Lordships of the Privy Council omitted to consider this ground of objection which was not only taken in the Chief Court but was actually argued by counsel before their Lordships

On this part of the case the respondents rely on the case of *Lakshmana Chetti* v *Chinnathambi Chetti* (1) There the parties one of whom was a minor, agreed to refer certain matters in dispute in a suit to arbitration. The court held that as the leave of the court was not obtained the minor was not bound by the award and accordingly the sale should be set aside It may be pointed out that in this case the court made no order of reference The submission to arbitration was a private submission to arbitration not made through the court It may further be pointed out that this decison was given before the decision of their Lordships of the Privy Council in the case of *Ghulam Khan* v *Muhammad Hassan*, already referred to While I am inclined to agree with the decision of the Court in the case of *Hardeo Sahai* v *Gauri Shankar*, referred to above, I do not think it is necessary in the present case to decide the point because I think that the appellants are entitled to succeed on the second ground. I have already pointed out that the present Code expressly authorizes the court making the order of reference to entertain objections taken on the ground of the invalidity of the award It seems to me that it was the clear intention of the Legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever should be decided by that court and by no other court. It is no doubt the duty of

(1) (1900) I. L. R., 24 Mad 326

the court which makes the order of reference to carefully consider all such objections and I think that the court ought not to hesitate to set aside an award if it finds that it is on any legal ground invalid.

I accordingly would allow the appeal and set aside the order of the court below and restore the decree of the court of first instance.

BANERJI, J.—The first question to be determined in this appeal is whether an appeal lay to the court below from the decree passed by the court of first instance. That decree was in accordance with an award of an arbitrator and was not in excess of the award nor at variance with it. There may be a few verbal differences between the language of the award and the language of the decree, but in substance the judgement of the court and the decree which followed it are in complete accordance with the award. In the appeal to the lower appellate court no objection was taken on the ground that the decree was not in accordance with or was in excess of the award. Paragraph 16 of the second schedule to the Code of Civil Procedure provides that where a decree is in accordance with the award, and not in excess of or at variance with it, no appeal lies. No doubt, before the new Code of Civil Procedure was enacted it had been held in a number of cases that for the finality of a decree made in accordance with an award, it was essential that there must have been an award valid in law. In this respect the present Code of Civil Procedure has made this alteration in the law that it has provided in paragraph 15 that an objection to the award may be taken on the ground that the award is "otherwise invalid". It is manifest from the provisions of the Code of Civil Procedure that the intention of the Legislature is to give finality to the decisions of arbitrators and to decrees passed in accordance therewith. Their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (1) emphasized the desirability of such finality. In consequence of this decision of their Lordships the Legislature apparently added the words "or being otherwise invalid" in clause (c) of paragraph 15 of the second schedule. Under the old Code an objection could not be taken before the court which referred the case to arbitration on the ground

(1) (1901) I. L. R. 29 Calc., 167.

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(1) (1900) I. L. R., 24 Mad 326

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(1) (1901) I. L. R. 29 Calc., 167.

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that the award was invalid for any reasons other than the reasons mentioned in section 521 of that Code But as pointed out above, an additional reason has been added in the present Code for objecting to an award namely, that it is ' otherwise invalid If upon such objection being taken the court judicially considers the objection and decides it in favour of the award and passes judgement in accordance with the award the decree which follows such judgement is under the present Code final and no appeal lies from it It is thus clear that the intention of the Legislature was that only one court namely, the court which referred the case to arbitration should try the question whether the award is invalid for any reason other than the reasons specifically mentioned in paragraph 15 It seems to me that the Legislature clearly intended to set at rest the conflict of opinion which existed before the enactment of the present Code and to take away the grievance which existed on the ground that the validity of an award could not be contested on any ground other than those specified in section 521 of the old Code It is therefore needless to consider the various rulings on the point in cases decided before the enactment of the present Code In the case before us the defendants took no objection before the court of first instance on the ground that the award was invalid because the agreement to apply to the court to refer the disputes between the parties to arbitration had not received the sanction of the court Any such objection could have been taken before the expiry of the period of limitation allowed for preferring such objections and not having been taken at that stage it could not at any subsequent stage be put forward as a ground for setting aside the award It was therefore too late for the defendants to urge as they did before the lower appellate court *that the award was invalid on the ground I have already* mentioned, and it is equally too late to urge before this Court that it is invalid I agree with the learned Chief Justice in holding that no appeal lay to the court below Having regard to this view it is not necessary to express any opinion on the other question raised in the argument before us, namely whether an agreement entered into by the guardian of a minor for making an application for an order of reference to arbitration comes within the purview of order XXXII, rule 7 of the Code I

would allow the appeal and set aside the order of the court below.

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RYVES, J.—I agree with the learned Chief Justice in thinking that the decision in I. L. R, 28 All, 35, was right I do not think the Legislature, by substituting the word "agree" in paragraph 1 of the second schedule of the new Code, for "desire" in section 506 of the old Code, intended that order XXXII, rule 7, should control proceedings under the second schedule, paragraph 1 But in any event I also agree with both my colleagues in thinking that no appeal lay to the lower appellate court on the ground that the award was invalid, no such ground having been taken before the court which made the reference within the period of limitation allowed. I also think that the appeal should be allowed

BY THE COURT.—The order of the Court is that the appeal be allowed, the order of the court below be set aside and the decree of the court of first instance restored with costs in all courts

Appeal allowed.

APPELLATE CIVIL.

Before Mr Justice Ryves and Mr Justice Piggott

1913 December, 12.

JAGARNATH SAHI (PETITIONER) v. KAMTA PRASAD UPADHYA (OPPOSITE PARTY) *

Civil Procedure Code (1908), *section* 148, *order IX, rule* 13—*Decree* ex parte—*Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order.*

On an application to set aside an *ex parte* decree the court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages This condition was not fulfilled, and the court—holding that it had no jurisdiction to receive the prescribed payment after the date fixed—disallowed the defendants' application to set aside the decree

Held (1) that an appeal lay from this order, and (2) that the court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms the original order having become inoperative *Suranjan Singh* v *Ram Bahal Lal* (1) distinguished

IN this case certain defendants, against whom a decree had been passed *ex parte* on the 12th of August, 1911, applied under

* First Appeal No 117 of 1913 from an order of V N Mehta Subordinate Judge of Jaunpur, dated the 12th of April, 1913

(1) (1913) I.L.R., 35 All., 582.

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order IX, rule 13, of the Code of Civil Procedure to have the decree set aside An order was passed on the 31st of March, 1913, restoring the case but this order was conditional on the applicant's paying to the plaintiff within three days a sum of 15 rupees as damages. The money was not paid in time, and the court, holding that it had no power to extend the time limited, passed an order, on the 12th of April 1913, disallowing the defendants' application to have the *ex parte* decree set aside From this order the defendants appeal to the High Court

The Hon'ble Munshi *Gokul Prasad* and Babu *Piari Lal Banerji* for the appellant

Dr *S M Sulaiman* for the respondent.

RYVES and PIGGOTT JJ — The appellants before us were defendants in a suit in which an *ex parte* decree was passed on the 12th of August, 1911 They applied in due course under order IX, rule 13 Civil Procedure Code to have the *ex parte* decree set aside. Under circumstances with which we are not now concerned this application only came up for disposal before the Subordinate Judge of Jaunpur on the 31st of March, 1913 After evidence had been taken the learned Subordinate Judge expressed himself as satisfied that the applicants had shown sufficient cause for having the *ex parte* decree set aside He then passed an order the first portion of which formally allows the application, sets aside the *ex parte* decree and directs the suit to be restored to its original number for re-trial To this, however, the following direction was appended "but the order of restoration will be subject to the payment of Rs 15 as damages by the applicant within three days to the plaintiff" The learned Subordinate Judge who passed this order happened to be transferred almost immediately afterwards, and on the 4th of April, 1913, the matter came before his successor It appears that the applicants had neither made nor tendered any payment to the plaintiffs before the 4th of April, 1913, on which date the money was tendered in court and the plaintiff refused to accept it. The question then arose whether the learned Subordinate Judge had jurisdiction to extend the time fixed by the order of the 31st of March, 1913, for payment of this money, and in any case what orders should now be passed on the application to set aside the *ex parte* decree

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The learned Judge of the court below has recorded a detailed order in which he concludes by expressing his opinion that he has no jurisdiction to entertain the application for extending the time and also that the order decreeing the suit *ex parte* must now stand. In accordance with this judgement a formal order was drawn up definitely dismissing the application to have the *ex parte* decree of the 12th of August, 1911, set aside. Hence the appeal now before us. It was contended at the outset on behalf of the respondents that no appeal lay, as the order under appeal was merely an order refusing to extend time, for which no appeal is provided. It is admitted that an appeal lies from an order rejecting, though not from an order allowing, an application under order IX, rule 13, but it was contended on behalf of the respondent that the only order passed under the provisions of order IX, rule 13, was the order conditionally granting the application. It seems to us that the appeal before us is in substance and reality an appeal against the formal order which followed on the judgement of the 12th of April, 1913, by which formal order the application for setting aside the *ex parte* decree was finally disallowed. We are, therefore, satisfied that an appeal does lie.

The next question is as to the jurisdiction of the learned Subordinate Judge when on the 4th of April, 1913, the money directed to be paid as damages was tendered by the applicants, one day after the prescribed time. It seems to us that the provisions of order IX, rule 13, do not contemplate the passing of a conditional order such as to have an effect analogous to that of a preliminary decree in a suit for pre-emption or on a mortgage. The proper order for the learned Subordinate Judge to have passed on the 31st of March, 1913 if he desired to put the applicants to terms in the manner in which he did, would have been an order directing that the applicants should deposit in court a sum of Rs. 15 on or before the 3rd of April, 1913, and that their application should then be put up for final disposal. In our opinion the order actually passed can only be dealt with as one having substantially the effect stated above. On the order as passed, the application to have the *ex parte* decree set aside was not finally disposed of, and a further formal order of some sort or kind remained necessary to be passed after the expiry of the time fixed by the court.

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The case is in our opinion in no way analogous to such a case as that of *Suranjan Singh* v. *Ram Bahal Lal* (1) in which it was held that section 148 of the Civil Procedure Code does not authorize the court to extend the time fixed by the decree for payment of purchase money in pre emption cases.

We are unable to treat the order of the 31st of March, 1913, as having the effect of such a decree. In our opinion the learned Subordinate Judge on the 4th of April, 1913, was still seised of the original application under order IX, rule 13 of the Civil Procedure Code, and had power to pass suitable orders in respect of the same. He could extend the time fixed for the payment of the prescribed damages, provided good cause were shown, under the powers recognised by section 148 of the Civil Procedure Code, or he could proceed to pass a fresh conditional order, setting aside the decree upon terms, in place of the order of the 31st of March, 1913, which had become ineffectual through the failure of the applicants to comply strictly with the prescribed conditions.

We are therefore, clearly of opinion that the order in appeal before us, that is the order disallowing the application to have the *ex parte* decree set aside dated the 22nd of April, 1913, should not be allowed to stand. We order accordingly and we return the case to the court below directing the learned Subordinate Judge to re admit the application under order IX rule 13 on to his file of pending applications and to consider on its merits which he has not yet done, the application of the 4th of April 1913 made on behalf of the present appellants to pay into court on that date the sum ordered to be paid as damages. He should then proceed to pass such orders as he may deem proper.

Appeal decreed and cause remanded.

(1) (1913) I L R, 35 All, 582.

PRIVY COUNCIL.

KALI BAKHSH SINGH AND OTHERS (DEFENDANTS) v RAM GOPAL SINGH AND OTHERS (PLAINTIFFS)

P. C.*
1913
October, 29, 30
November, 27

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow]

Pardanashin *lady—Execution of deed—Suit for cancellation of deed—Onus of proof—Nature of proof required—Independent advice not absolutely necessary—Lady of strong will and in the habit of managing her affairs with considerable capacity for business—Undue influence—Natural affection*

In the case of a deed executed by a *pardanashin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon, the deed, and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to, and really understood by, the grantor It must also be established that it was not signed under duress, but by the free and independent exercise of her will. *Sajjad Husain* v *Wazir Ali Khan* (1) followed

There is no absolute rule that a deed executed by a *pardanashin* lady cannot stand unless it is proved that she had independent advice The possession or absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction, and if, upon such a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand

In a suit for cancellation of a deed of gift executed by a *pardanashin* lady the facts were that her husband had died long before, and her property (consisting of shares in a large number of villages) was managed by her mukhtar with whom she had formed an intimacy, the result of which was the birth of two illegitimate daughters, one of whom was alive at the date of the deed. The donee was the legitimate son of her mukhtar. The deed was found to be duly executed, attested by just the persons who would naturally be called upon for such a purpose, and registered in the usual way by the proper officer The property given was about one half of her estate, and there was no question of her being impoverished by giving it. No undue influence was affirmatively proved It appeared in evidence that the lady was strong minded and had been in the habit for many years of managing her affairs, of entering up her accounts and of attending to business matters

Held (reversing the decision of the Court of the Judicial Commissioner) that the evidence as to her strength of will and business capacity, and the fact that the deed was not, in the circumstances of her life, in any way an unnatural disposition of her property, went far, taken together with the other evidence in

* *Present:*—Lord SHAW, Lord MOULTON, Sir JOHN EDGE and Mr AMEER ALI.

(1) (1912) I L. R., 34 All., 455, L. R., 39 I. A., 156

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the case, to make it conclusive that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it; and that had independent advice been obtained the lady would have acted just as she did *Mahomed Buksh Khan* v *Hosseini Bibi* (1) referred to

APPEAL from a judgement and decree (21st May, 1908,) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (15th February, 1907,) of the Subordinate Judge of Rae Bareli.

The plaintiff stated that one Bishunath Singh was the owner of shares in the property in suit, and during his life time he transferred his rights in the property to his son Brij Mohan Singh, in whose favour mutation of names was made in the Revenue Courts; that Brij Mohan Singh died in 1882 leaving a widow named Balraj Kunwar, who succeeded to her husband's estate; that on the 24th of September, 1903, she executed a deed of gift of the property in suit in favour of Ganga Bakhsh Singh, the second defendant, whose father, Kali Bakhsh Singh, was her agent and trusted adviser; that Balraj Kunwar died in November, 1903, and on her death the first plaintiff Bhola Singh, the predecessor in title of the respondents, became entitled, as reversioner, to the property left by her, but mutation of names was made in favour of Ganga Bakhsh Singh in respect of such property.

The second plaintiff was a transferee of a portion of the property. The suit was brought on the 17th of September, 1906, against the defendants for possession of the property, the plaintiffs alleging that if the deed of gift, dated the 24th of September, 1903, was executed by Balraj Kunwar, it was not binding on her, and consequently not binding on them, on the ground that Balraj Kunwar had no independent advice and was besides incapacitated by illness from understanding the nature of the transaction.

The defence was that Bishunath Singh never gave any portion of his property to his son, with whom he was joint in estate, and, on the death of Brij Mohan Singh in 1882, Bishunath Singh became the sole owner of it; that Bishunath by deeds of gift, dated the 9th of April, 1890, and 30th of April, 1892, transferred the property to Balraj Kunwar, and in July, 1888, and September, 1890, he made wills in her favour leaving her portions of his property for her life, with remainder to one Surajpal Singh; that on the 27th

(1) (1888) I. L. R., 15 Calc., 684: L. R., 15 I. A., 81

of February, 1892 Balraj Kunwar made a will by which she left the property in suit to Bishunath Singh for his life with remainder to Surajpal Singh, that on the 24th of September, 1903, she made the deed of gift of the property in suit to Ganga Bakhsh Singh the second defendant, and that if the last named deed were invalid, the property in suit passed to Surajpal Singh under the wills above mentioned and the plaintiffs therefore had no right of suit in respect of it

The material issues are stated in the judgement of the Judicial Committee. No issue was framed as to the wills which the defendants alleged to have been made by Bishunath Singh and Balraj Kunwar and their effect on the plaintiffs' right to the property in suit.

The Subordinate Judge found that the evidence of the plaintiff's witnesses that the health or the state of her mind incapacitated Balraj Kunwar from making an intelligent execution of the deed of gift was quite unreliable, and held that she voluntarily executed the deed while in a sound state of body and mind and after having its terms and effect explained to her and that the deed was binding upon her, and made a decree dismissing the suit with costs

An appeal by the plaintiffs to the Court of the Judicial Commissioner was heard by Mr E CHAMIER Judicial Commissioner, and Mr H D GRIFFIN Second Additional Judicial Commissioner who were of opinion that the matter in dispute between the parties was narrowed down to the three questions following (1) whether Bishunath Singh made an effective gift of his property to his son Brij Mohan Singh, as alleged by the plaintiffs, in 1869; (2) (a) whether Balraj Kunwar executed the deed of gift of the 24th of September, 1906 and if so (b) whether it was binding upon her; and (3) whether with reference to the wills of Bishunath Singh and Balraj Kunwar the plaintiffs had any right to the property in suit

On the first question the Subordinate Judge had held that the alleged transfer to Brij Mohan in 1869 had not been proved, and the Court of the Judicial Commissioner agreed with that finding On the second question that Court dissented from the Subordinate Judge being of opinion that it had not been proved that Balraj Kunwar had independent advice or understood the transaction, and

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therefore the deed of gift of the 24th of September, 1903, could not stand.

On this point the material portion of the judgement of the Judicial Commissioner (the Second Additional Judicial Commissioner concurring) was as follows —

"The facts suggest that the deed of gift must have been procured by the influence of defendant No 1 Balraj Kunwar was a young *pardanashin* woman in an advanced state of pregnancy cut off by her misconduct from the rest of her family She was also ill, but the evidence as to this is vague. Defendant No 1 was not bound to her in any way, he might have deserted her at any time, yet she made him a present of the best part of her property worth admittedly more than Rs 25 000

"It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice Any intelligent and independent person would have told her at once that if she wished to benefit her paramour the proper thing to do was to make a will in his favour. There is no evidence whatever as to the origin of the deed of gift The Registering Officer and the other witnesses who it may be observed, are all friends or dependents of defendant No 1 say that the deed was read out to her and *explained* to her One knows from experience of these cases what explanation of this kind means A deed couched in language which is for the most part unintelligible to an uneducated woman is read over to her and she is asked whether she understands it She replies 'yes' and the deed is registered In the present case the deed contains Persian words which it is safe to say the lady did not understand It is easy for witnesses to add that the executant said she is executing it of her own pleasure *(khushi se)* I doubt this part of the evidence, but even if it is true it does not avail the defendants. Defendant No. 1 was present at the time and what is wanted is evidence to rebut the presumption that the lady was acting under his influence He did not come into the witness box and there is no evidence whatever that the lady was a free agent and understood the effect of the deed on her interests. According to the witness Mahabir, the Registering Officer told the lady that after the execution of the deed she would have no right left in Asaipur and Baradih If he did so he was wrong for she had a one anna share left The fact that the gift relates to a 9 anna 8 p e share in the two villages and not to the whole of her share is curious. It may be that she thought she was making a will as she did in 1892.

"In my opinion it has not been proved that Balraj Kunwar had independent advice or understood the transaction and therefore the deed of gift cannot stand."

In that view it became necessary to have a decision on question No 3, and the case was accordingly remanded to the Subordinate Judge for a finding on that question.

After taking further evidence the Subordinate Judge held that it was proved that the wills of Bishunath Singh of 1888 and 1890

had been duly executed As to the will of Balraj Kunwar of the 27th of February, 1892, he held that, assuming that she signed the will, it had not been proved that it was explained to her or that she understood it, or that she had any independent advice, and that therefore the right of the plaintiffs to the property in suit was not affected by the wills of 1888 1890 and 1892

When the case again came before the Court of the Judicial Commissioner the fresh evidence and the finding thereon of the Subordinate Judge were considered by the Judicial Commissioner (Mr E CHAMIER) and the Second Additional Judicial Commissioner (Mr R GREEVEN) and in the result they both concurred with the Subordinate Judge as to the will of Balraj Kunwar, which they found was duly executed by her

Mr CHAMIER said that from the general circumstances of the case he inferred that Balraj Kunwar was perfectly aware of the contents of the will and that Bishunath Singh with respect to her occupied the position of an independent adviser, but as the Subordinate Judge had found that it was not proved that Balraj Kunwar understood the will and as his learned colleague was strongly of opinion that the Subordinate Judge's finding was right, and as he (Mr CHAMIER) was not satisfied the finding was wrong he was prepared to accept their view

Mr GREEVEN said that on a close examination of the evidence he was of opinion that the defendants had failed to establish (1st) that the signature to the will was that of Balraj Kunwar, and (2nd) that even it were hers, she understood the nature of the document and moreover he felt himself unable to infer from the general circumstances of the case, that in this instance Bishunath Singh was an independent adviser

The appeal was therefore allowed and the suit decreed with costs in both courts

On this appeal —

DeGruyther, KC and *B Dube* for the appellants contended that the evidence established the validity of the deed of gift dated the 24th of September 1903 it was read over, and its terms explained to the executant Balraj Kunwar, and it was voluntarily executed by her with full knowledge and understanding of its contents and of their effect Her capacity to make such a deed

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was undoubted, and she had thus fulfilled all the requirements of a valid and operative deed Though Kali Bakhsh was not examined he offered himself for cross examination, but no questions were put to him On the other hand, the respondents' witnesses were described by the Subordinate Judge who saw and heard them as quite unreliable Reference was made to *Sajjad Husain* v *Wazir Ali Khan* (1) and the cases there cited, and *Mahomed Buksh Khan* v *Hosseini Bibi* (2) There was no proof of any undue influence over Balraj Kunwar. As to the influence caused by the confidential relation in which Kali Bakhsh stood towards her, *Oomber* v *Oomber* (3) was referred to Here, as in that case, there was no doubt some natural affection towards the donee and the deed was upheld without evidence of independent advice Under the circumstances of the case it was submitted that the deed of gift was not an unnatural or improbable disposition of her property by Balraj Kunwar The onus of proving the deed to be invalid and of no effect was therefore on the respondents The will of the 27th of February 1892 was, it was also contended, valid, and in view of its provisions the respondents had no title to the property in suit.

Sir Erle Richards K C, and *Ross K C* for the respondents, contended as to the deed of gift that it was invalid and could not stand because it had not been shown that Balraj Kunwar had, in the matter of its execution, any independent advice or understood the transaction. Reference was made to Trevelyan's Hindu law, page 490 As to the general law on the subject of the execution of deeds by *pardanashin* ladies reference was made to section 111 of the Evidence Act (I of 1872), Ameer Ali's and Woodroffe's Law of Evidence (4th ed) pages 584 587, *Kanailal* v *Kamini Debi* (4), *Sajjad Husain* v *Wazir Ali Khan* (5); *Mahomed Buksh Khan* v *Hosseini Bibi* (6), *Allcard* v *Skinner* (7) per COTTON L. J, and Pollock on Contracts (8th ed), page 640, where the last named case was referred to The onus of proof was on

(1) (1912) I. L. R 34 All., 455 (462) L. R., 39 I A., 156 (160)
(2) (1888) I. L. R., 15 Calc., 684 (699) L. R., 15 I. A., 81 (93)
(3) (1910) 1 Ch D., 174 on appeal (1911) 1 Ch., 723
(4) (1867) 1 B L. R., O. C., 31 note
(5) (1912) I. L. R., 34 All., 455, L. R., 39 I. A., 156.
(6) (1888) I. L. R., 15 Calc., 684 L. R., 15 I. A., 81
(7) (1887) L. R., 36 Ch D., 145 (171)

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those who relied on the deed and benefited under it and the Judicial Commissioner's Court had held that the appellants had not discharged that onus

DeGruyther K C, in reply as to the contention that Balraj Kunwar had no independent advice referred to *Hakim Muhammad Ikram-ud-din* v *Najiban* (1) as showing that there were circumstances (as for instance where the lady was fully capable of managing her own affairs) in which the want of independent advice was not fatal to the validity of the deed In the present case the evidence showed that Balraj Kunwar had considerable business capacity The opinion referred to in Trevelyan's Hindu law was not in accordance with any decision The appeal, it was submitted, should be allowed.

1913, November 27th —The judgement of their Lordships was delivered by Lord SHAW —

This is an appeal from a judgement and decree of date the 21st May, 1908, of the Court of the Judicial Commissioner of Oudh which reversed a judgement and decree of the Subordinate Judge of Rae Bareli dated the 15th of February 1907.

The plaintiffs ask that a decree for actual and proprietary possession of certain shares in villages in pargana Salón be passed in their favour against the defendants and for an account of mesne profits

It is unnecessary to enter upon many details of the case The portion of it which was laid before the Board consists in a demand for cancellation of a deed of gift, dated the 24th of September, 1903 executed by one Balraj Kunwar in favour of Ganga Bakhsh Singh son of the appellant Kali Bakhsh Singh

This deed has been upheld by the Subordinate Judge, and has been declared invalid by the Court of the Judicial Commissioner

It is important to observe what were the grounds for the cancellation of this deed They are gathered together in the issues framed by the Subordinate Judge and are as follows —

"(1) Did the lady execute the deed of gift?

(2) Was it 'written and completed without her knowledge? Was she able to understand' the transaction?

(3) Was she of unsound mind at the time of the writing of the said deed?"

(1) (1898) I L R, 20 All, 447 L R 25 I A 137.

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The relation of the parties to the deed was briefly stated thus —Balraj Kunwar, who died two months after the execution of the deed of gift was a *pardanashin* lady She was possessed of a number of villages or rather of shares therein and she had become absolute owner thereof as the result of gifts made by one Bishunath Singh At least six deeds of gift are produced and there can be little doubt that the lady thoroughly understood this form of transaction Her husband had died many years before namely in 1881 and her property was managed by Kali Bakhsh Singh who was her *mukhtar*, and with whom she formed an intimacy, the result of which was the birth of two illegitimate daughters One of these was alive at the date of the deed

Ganga Bakhsh Singh was the legitimate son of Kali Bakhsh Singh and the suggestion seems to be warranted which points not only to the affection which Balraj Kunwar had for Kali Bakhsh, but to the attachment which she had formed to the boy The interests represented by the plaintiffs are derived from remote relationship to Brij Mohan Singh the deceased husband, and to Bishunath Singh the father in law of the lady

Upon the issues as framed and the contentions of parties as pled the Subordinate Judge who manifestly conducted the case with great care, had no doubt As to the plaintiffs evidence he holds that it is absolutely unreliable and seems to me a pure concoction. Reasons are given for this opinion, and the judgement upon this part of the case does not seem to be controverted in the Court of the Judicial Commissioner In short the attack upon the deed by the evidence led by the plaintiffs has failed

As to the evidence tendered in support of it the matter stands thus *ex facie* it is duly signed and attested It bears the signature of Balraj Kunwar of the patwari Lachman Prasad, and of three other witnesses including the family priest Above all, there is the certificate of Lunyad Husain the Sub-Registrar of Salon as to what occurred when the deed was produced by Balraj Kunwar before him at her residence It is duly registered There seems no reason to doubt the value of his testimony which is believed in its entirety by the Subordinate Judge Apart from the circumstances to be now mentioned, the deed appears to be

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beyond suspicion, being attested by just those persons who would be naturally called in for such a purpose and being registered in the usual way by the proper officer

Their Lordships in line to the opinion that the judgement of the Subordinate Judge would not have been reversed but for the controlling weight which was attached by the Court of the Judicial Commissioner to the fact that the lady in the transaction had not independent advice. The view, put briefly adopted in that Court is this The deed was executed in favour of the son of a paramour and therefore, to all intents and purposes, in favour of the paramour himself, he also being a person who was her *mukhtar* Although there is no direct evidence that he ever influenced her to make a gift in favour of his son still, in the circumstances the deed (so it is maintained) must fall, because the law makes an absolute demand that a person in such a situation should have independent advice The absence of this element entitles a court of law to set the deed aside

There are several circumstances which favour this conclusion In the first place the lady was a *pardanashin* lady, and the law throws around her a special cloak of protection It demands that the burden of proof shall in such a case rest not with those who attack, but with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to and was really understood by, the grantor In such cases it must also, of course be established that the deed was not signed under duress, but arose from the free and independent will of the grantor The law as just stated is too well settled to be doubted or upset It was expressly re-affirmed by this Board in the case of *Sajjad Husain* v *Wazir Ali Khan* (1), and nothing that is now said can, or is intended to, disturb it

In the next place, a fact which has given rise in their Lordships minds to considerable difficulty, has been that Kali Bakhsh the father of the donee and the *mukhtar* of the donor, was not examined as a witness

This brief review is given by way of indication that the judgement now to be announced has been arrived at after a full

(1) (1912) I. L. R., 34 All., 455 L. R., 39 I A., 156

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balancing of the considerations both in fact and in law which affect the question to be determined.

The property conveyed by the deed of gift amounted, as the Board were informed, to about one half of the lady's estate It was not contended that her outward style or mode of life had thereby been changed, or that any impoverishment had occurred, the case being thus distinguished from those of donations of practically the entire property of the donor, of which the case of *Sajjad Husain* above referred to was an instance

Their Lordships are satisfied on the salient features of the case as follows —

1 As to the execution of the deed. The challenge of this has failed, and both the Courts below hold the execution to be properly and satisfactorily established

2 As to the capacity of the grantor Upon this subject the Courts below are also agreed in holding that competency is proved In their Lordships judgement, this is so, as after mentioned, in a special degree

3 As to the deed being read over and explained Again both Courts are agreed But while the Subordinate Judge thinks that the explanation was thorough, the Judicial Commissioners appear to incline to the view that it was perfunctory Upon this matter much depends upon whether the grantor of the deed was a person accustomed to business or to the mangement of affairs It is upon this point that their Lordships find themselves in agreement with the Subordinate Judge In doing so they found upon what is admitted, not only by him, but by the Court of the Judicial Commissioner It appears that the lady had been in the habit for a considerable period of years of managing her affairs of entering up her accounts and of attending to business Upon another part of the case it rather appears from the judgement of the Judicial Commissioner Mr CHAMIER that the lady had much strength of will, and that her father in law Bishunath Singh used to obey Balraj Kunwar more than the latter obeyed him,' while with reference to the issue now under discussion the same Judical Commissioner says —' It is proved by evidence adduced by the plaintiffs that Balraj Kuar signed her own accounts and looked after her own affairs" Their Lordships, in short, do not entertain

much doubt that this *pardanashin* lady was a capable woman fully alive to the direction of her own interests, and well aware of what she was doing

4 As to undue influence Nothing of this kind is proved affirmatively, and the inference upon the subject must depend to a considerable extent upon the view which is taken as to the capacity of the grantor of the deed. The suggestion that Kali Bakhsh prompted a gift in favour of his son does not seem to rest upon anything more than that he was *mukhtar*, or held a power of attorney in regard to the management of her property It is regrettable that the matter was left thus in the region of conjecture There is no evidence of any kind that the *mukhtar* either mismanaged or overmanaged anything committed to his charge or that in any particular regarding her affairs he withstood the lady or controlled her purposes It is accordingly necessary to consider whether the facts of this case fall under the general and useful category of the principle which in the language of Lord Kingsdown in *Smith* v *Kay* (1) applies to every case where influence is acquired and abused where confidence is reposed and betrayed' Their Lordships do not find themselves able to affirm that such abuse or betrayal occurred. It is no doubt true that the evidence in such a case would not require to have been very strong, but there is no evidence at all which would lead to the conclusion.

As stated their Lordships incline to think that the judgement of the Subordinate Judge would have been affirmed by the Judicial Commissioners but for the view thus expressed —" It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice

In their Lordships' opinion there is no rule of law of the absolute kind here indicated The possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction If she did, the issue is solved and the transaction is upheld but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as

(1) (1859) 7 H L C 750 (779)

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well as the proximate circumstances affecting the execution :— if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. The present, in their Lordships' judgement, appears to be a case of that kind.

Their Lordships, as already mentioned, have fully in view the fact that the lady was a *pardanashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the judgement of Lord Macnaghten in *Mahomed Buksh Khan* v. *Hosseini Bibi* (1).

In these circumstances their Lordships will humbly advise His Majesty that the judgement and decree appealed from should be reversed and that of the Subordinate Judge of date the 15th of February, 1907, should be restored. The appellants will be entitled to the costs since the date of the last mentioned judgement and to the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

(1) (1888) I. L. R., 15 Calc., 684: L. R., 15 I. A., 81.

JAGRANI KUNWAR AND OTHERS (DEFENDANTS) *v* DURGA PRASAD (PLAINTIFF)

P C* 1913 *November,* 3, 4 *December,* 3.

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow]

Will—Execution and attestation of will—Proof of genuineness of will—Status of attesting witnesses—Will natural, reasonable and proper in its terms—Presumption of will being genuine—Grounds of suspicion not valid—Admission of additional evidence by appellate Court—Section 568 of Civil Procedure Code, 1882.

In the case of a will reasonable, natural, and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety

On the question whether a will made by a Hindu in which he left all his property, movable and immovable, after the death of his widow, to his sister's son (one of the appellants) to the entire exclusion of the respondent (a remote relation) was genuine as held by the Subordinate Judge, or a forgery as held by the Court of the Judicial Commissioner, there were concurrent findings of both Courts that the testator had been for years at enmity and on the worst of terms with the respondent, but had regarded the appellant with affection and treated him as his son. The will was found to have been duly executed, and properly attested by respectable servants in the testator's house whom it was natural to employ for that purpose.

Held that the will was in every respect a natural one, and in accordance with the testator's feelings and tenor of life and the presumptions of law were in favour of its being maintained.

A comment by the Court of the Judicial Commissioner, which regarded the will with suspicion, to the effect that "the witnesses might have been of a better class" had no force except upon something on a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a court that those persons had committed both forgery and perjury.

Choley Narain Singh v *Ratan Koer* (1) per Lord WATSON, followed.

Another ground of suspicion was "that the paper on which the will was written appeared to be old instead of fresh," which was supported by proof that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms which they signed in blank, and forms were produced signed by people other than the testator, and with none of which he had anything to do

Held that such evidence was inadmissible as being not relevant to the case, and should not have been admitted

Held further that the course followed by the Court of the Judicial Commissioner during the hearing of the appeal in sending for and (purporting to act under section 568 of the Civil Procedure Code, 1882) admitting additional evidence (proceedings of the Municipal Board at Lucknow) to discredit one of

* *Present* :—Lord SHAW, Lord MOULTON, Sir JOHN EDGE and Mr AMEER ALI

(1) (1894) I. L. R., 22 Calc, 519, L. R., 22 I A, 12.

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the witnesses on a particular point, without calling him and affording him an opportunity of making an explanation of the matter, and on the ground that his evidence appeared untrue on that point disbelieving all the rest of his testimony as to the will, was an improper procedure and not in accordance with section 568 of the Code. Their Lordships declined to conclude, in the absence of his own evidence on the point that the rest of his testimony otherwise quite unimpeachable was perjury

APPEAL from a judgement and decree (11th January, 1909) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (4th February, 1908) of the Court of the Subordinate Judge of Hardoi

The main question for determination on this appeal was whether or not a will executed by one Kunwar Narindra Bahadur on the 21st of October, 1904, was a forged document

The Subordinate Judge held that the will was genuine The Court of the Judicial Commissioner (Mr E CHAMIER Judicial Commissioner, and Mr W TUDBALL, Second Additional Judicial Commissioner) on appeal came to the conclusion that the will was forged, and set aside the judgement and decree of the Subordinate Judge

The facts of and the evidence in the case will be found sufficiently stated in the judgement of their Lordships of the Judicial Committee

During the argument in the Court of the Judicial Commissioner, that Court sent for and admitted in evidence certain proceedings of the Municipal Board of Lucknow which purported to show that one Chaudhri Nasrat Ali, a witness who had stated in his evidence that he had signed the will at Sandila as an attesting witness on the 20th of April, 1905, had on that day attended a meeting of the Municipal Board at Lucknow which is 30 miles distant from Sandila; but the Court did not call on Nasrat Ali to give evidence.

On this appeal—

De Gruyther, K C, and *Amiend Jackson*, for the appellants, contended as to the will executed by Narindra Bahadur on the 21st of October, 1904, that the evidence on the record established its genuineness The fact as found by the Subordinate Judge that the respondent Durga Prasad and the testator were on the worst of terms created a strong antecedent probability that the testator should desire to exclude him from the succession On the other hand the appellant Raj Bahadur was always treated by Narindra

Bahadur as his son and it was only natural that he should provide for him by will as he could not succeed on an intestacy. As to the position of Raj Bahadur in the testator s household, and the bad terms on which the respondent and the testator lived there were concurrent findings of both Courts against the respondent The genuineness of the signature of Narindra Bahadur to the will was in the opinion of the Subordinate Judge proved by overwhelming evidence The writer and the attesting witnesses were all respectable servants of the testator employed in his house and it was most natural that they should have performed the services they did in the preparation and attestation of the will They stood the lengthy cross examination well and were believed by the Subordinate Judge who saw them and heard them give their evidence He also believed Nasrat Ali as being an independent witness with no sort of interest in the case Reference was made to *Tacoordeen Tewarry* v *Ali Hossein Khan* (1) and *Shama Charn Kundu* v *Khettromoni Dasi* (2)

It was also contended that in admitting additional evidence on appeal the Court of the Judicial Commissioner had acted improperly, and in a manner not warranted by the Civil Procedure Code 1882 Section 568 of that Code and the case of *Kessowji Issur* v *Great Indian Peninsula Railway* (3) were referred to The appellate Court in admitting the evidence which was used to discredit that of Nasrat Ali, one of the attesting witnesses to the will, without giving him an opportunity of being heard in explanation, had seriously prejudiced the appellants Such additional evidence, moreover, did not warrant the conclusions drawn from it

Ross, K C, and *B Dube* for the respondent contended, mainly on the grounds taken in the judgements of the Court of the Judicial Commissioner (which are stated and dealt with in the judgement of their Lordships of the Judicial Committee) that that Court had rightly held that the appellants had failed to discharge the onus of proving that the will of Narindra Bahadur was genuine It was submitted that a strong case for suspicion was made out by the Judicial Commissioner s Court on the evidence The signature to the alleged will was spoken to and recognized by many of the

(1) (1874) L R 1 I A 192 13 B L R 427

(2) (1899) I L R 27 Calc 521 (523) L R, 27 I A 10 (12)

(3) (1907) I L R 31 Bom, 381 (390) L R 34 I A, 115 (122)

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witnesses as being that of the testator and it was contended that it was at least possible that the suggestion made by the respondents, that it was written on a blank piece of paper, was correct and the body of the will afterwards forged on the paper The Court of the Judicial Commissioner favoured that supposition, but by the concurrent findings of both Courts as to the enmity between Durga Prasad and the testator and the affection of the testator for Raj Bahadur, whom he treated as a son the Judicial Commissioner's Court as well as the Subordinate Judge certainly appear to admit the probability that the will (though the appellate Court thinks it a forgery) is very much as the testator himself would have desired it to be

As to the alleged improper admission of additional evidence on appeal it was admitted by the Judicial Commissioner's Court without any opposition on the part of the appellants who might therefore be considered to have consented to such additional evidence being admitted and *Jagarnath Pershad* v *Hanuman Pershad* (1) was referred to This evidence showed that the statements as to his attestation made by Nasrat Ali, an important witness for the appellants upon whose evidence as to the disputed will the Subordinate Judge strongly relied could not be true, and the appellants made no attempt to contradict or explain the additional evidence

Counsel for the appellants were not called upon to reply

1913 December 3rd —The judgement of their Lordships was delivered by Lord SHAW —

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh dated the 11th of January, 1909 This partly affirmed and partly reversed a judgement and decree dated the 4th of February 1908 of the Court of the Subordinate Judge of Hardoi.

The only question raised at the Bar of the Board was whether a will executed on the 21st of October, 1904 by one Kunwar Narindra Bahadur is or is not a genuine will

Its provisions are substantially these That after his death his widow should be proprietor of his estate in the Kheri district and should have absolute power over the estate in the Hardoi district

(1) (1909) I L R., 36 Calc, 833 L R 36 I A., 221.

and hold proprietary possession over all his estate. By the third clause of the will it was provided that after her death "Raj Bahadur, my sister's son shall be the absolute owner of all my property, movable and immovable, of every description" Other provisions, including certain annuities to the testator's brother in law, occur in the will.

Ex facie it was duly executed and properly attested, and the witnesses are, first, his diwan, or general agent, secondly a servant, who appears to have had charge of the wardrobe and a certain power of supervision, including that of making purchases, and lastly, his treasurer, or confidential clerk. In the words of the Subordinate Judge —

"The scribe of the will is the mukhtar and the three attesting witnesses are the diwan the treasurer, and the darogha of the late Kunwar Narindra Bahadur who were his respectable private servants and used to be always in the house as is the case with Indian gentlemen in the position of the Kunwar"

The domestic position of the testator and the parties was this: Durga Prasad, the respondent was remotely related to the testator Narindra, and for years had been on terms of enmity with him Details of this are given, as, for instance, that they had not been on "eating and visiting terms," and that there "used to be no exchange of presents during marriages" Both the Courts below are clear upon the subject, the Judicial Commissioner's opinion being so strong as this, that "the ill feeling, however, which existed between the two men was quite sufficient to cause Narindra Bahadur to desire that his property should not go to the plaintiff or his branch of the family"

On the other hand, the appellant, the testator's sister's son, was treated with regard and affection by the testator, and upon this subject also both Courts have no doubt In the language of the judgement of the Judicial Commissioner —

'In respect of the feelings which existed in Narindra Bahadur's mind towards the defendant Raj Bahadur, there can also be but little doubt . . Narindra Bahadur treated his sister's son as if he were his own son in every way . . . This feeling of affection towards his sister's son by a childless Hindu is fairly common, and after full consideration of the evidence on the point, I have no hesitation in holding that Narindra Bahadur did look upon defendant No 2 more or less in the light of a son It would therefore not have been a matter for surprise if he had made a will benefiting the latter"

This being the state of the relations of the parties to the

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testator, it stands conceded that the will now challenged was in every respect a natural will, and in accord with his feelings and tenour of life. Granted, therefore, that its execution is proved by anything like reasonable evidence, the presumptions of law are in favour of its being maintained. The Subordinate Judge, after a close analysis of all the evidence, affirms its validity, and that without hesitation. Every kind of challenge was made of it,—of its execution, of the status of the witnesses, of the health of the testator, and so on. But at the end of the long ligitation upon the subject it was admitted by Mr. Ross, the learned counsel for the respondent, in his clear and candid argument at their Lordships' Bar, that the signature was genuine, nor could he venture to disturb what he admitted were concurrent findings on the subject of the appellant's position in the testator's household being equal to that of a son, nor upon the point of the estrangement between the testator and the respondent.

This makes an end of a considerable portion of the judgement of the Judicial Commissioner, which treats the signature as suspect. The grounds of suspicion which that Court, notwithstanding its view as to the complete propriety and naturalness of the will itself, nevertheless attaches to the execution, are three-fold.

1. In the first place, it is maintained that the witnesses might have been a better class. Perhaps they might; but they were just those witnesses that the testator had about him; and a comment of this character has no force except upon something on a much higher level than mere suspicion, viz. proof which would thoroughly satisfy the mind of a Court that these persons had committed both forgery and perjury. In the case of a will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. Their Lordships venture to repeat the judgement of Lord WATSON in *Chotey Narain Singh* v. *Ratan Koer* (1) bearing upon the point of an attestation by a person's own servants and dependants. As has been shown, the execution of this will

(1) (1894) I. L. R. 22 Calc., 519 (531): L. R., 22 I. A., 12 (23).

was not only not improbable, but was in fact probable, The words of Lord WATSON apply to this case therefore, *a fortiori* —

'The theory of improbability remains to be considered, and the first observation which their Lordships have to make is that in order to prevail against such evidence as has been adduced by the respondent in this case, an improbability must be clear and cogent It must approach very nearly to, if it does not altogether constitute, an impossibility To give effect to the argument pressed upon this Board by the appellants which seems to have found favour in the Court of first instance, would be equivalent to holding that the will of a Hindu gentlemen, attested by his own servants and dependants, must be held to be invalid, unless it is shown that the testator, at the time assigned for its execution, was placed in such circumstances that he could not secure the attendance of persons of a higher rank That is proposition which verges too closely on the absurd to be seriously entertained There may be cases in which attestation by servants only is an important element to be taken into account in considering whether a will has been validly executed—cases, for example, in which there is reasonable ground for suspicion that the will is not the voluntary act of the testator, but has been procured by the undue influence of members of his household. This case does not in the opinion of their Lordships, belong to that class."

This point, however, is at an end because the execution and attestation are proved

2 The second ground of suspicion in the minds of the Judicial Commissioners was that the paper upon which the will was written appeared to be old instead of fresh, and proof was given that the paper was official paper in general use, together with evidence that some other people had been in the habit of having forms or sheets which they signed in blank In the language of the judgement of the Judicial Commissioner —

"That men of the deceased s position in life do sign blank forms and blank sheets, especially for the purpose of vakalatnamas being drawn up thereon for use in cases in the subordinate district courts is not an unheard of thing '

Various forms were produced signed by people other than the testator, and with none of which the testator had anything to do In their Lordships' opinion, such evidence should not have been allowed to influence the mind of a Court It should not have been admitted, as it was not relevant to the present cause

3 The third matter appears, however, to their Lordships to be more serious By section 568 of the Code of Civil Procedure it is provided that if ' the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement or for any other substantial cause, the

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appellate Court may allow such evidence to be produced or document to be received or witness to be examined ' In the course of the hearing of this appeal by the Judicial Commissioners a question was asked as to the additional attestation of the will which purported to have been made on the 20th of April, 1905, (that is on a date about 6 months after execution) by Muhammad Nasrat Ali This gentleman appears from the record to be a person of standing, the judgement mentioning that he is the Honorary Secretary or Assistant Secretary of the British Indian Association He is also a member of the Municipal Board of Lucknow Lucknow being thirty miles by train from Sandila where the will was ordered to be registered On this date 20th of April, a meeting of the Municipal Board had been held followed by a special meeting both meetings being early in the day and being of some duration. Inquiry was made and it was proved before the Judicial Commissioners that Nasrat Ali was present at these meetings If this was so then it was argued he could not at the same hours of the 20th April have been in Sandila

Nasrat Ali had been examined before the Subordinate Judge but nothing had been asked of him on the point and he was not examined by or before the Judicial Commissioners Their Lordships disapprove of the procedure which has permitted doubt to be thrown upon his evidence in the course of procedure taken on appeal by the Judicial Commissioners ' to enable them to pronounce judgement without the witness whose testimony is impugned having been afforded the opportunity of clearing up the mistake and having been convened for that purpose No witness, whatever his standing would be safe from adverse judicial comment under such procedure It may quite well be that Nasrat Ali could have clearly explained the whole point of difficulty, and their Lordships would be slow to conclude, in the absence of his own evidence on the point, that the rest of his testimony, otherwise quite unimpeachable was perjury

Fortunately, there is no necessity for further procedure or expense in regard to the matter, for the case that the Board is now dealing with is a case in which the signature of the will, whether the deed was additionally attested on the date stated or not, is proved and is properly attested. In these circumstances their

Lordships do not doubt that the judgement of the Subordinate Judge should be restored.

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They will accordingly humbly advise His Majesty to that effect. The respondent will pay to the appellant the costs of this appeal, and in the Courts below.

Appeal allowed.

Solicitors for the appellants :—*T. L. Wilson & Co*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

J. V. W.

SHER BAHADUR (PLAINTIFF) v GANGA BAKHSH SINGH AND OTHERS (DEFENDANTS)

*P. C. 1913 *August, 1, 4, 5 December, 10*

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow].

Will—Construction of codicil—Bequest creating succession of life interests to illegitimate son and his (aulad) *issue—Whether "aulad" includes illegitimate issue—Marriage of son by birth a Muhammadan to Hindu caste ladies—Intention of testator—Muhammadan brought up as orthodox Hindu*

The question in this appeal was as to the construction of a codicil to the will of the late Maharaja of Balrampur who was a Hindu of the Chattri caste, by which he purported to make provision for *J B* his son by a Muhammadan mistress, who as held by the Courts below, was by birth a Muhammadan. He afterwards, however, became as far as was possible a Hindu. The appellant (plaintiff) was the eldest son of *J. B* by a Muhammadan woman, and the second, third and fourth respondents were his brothers, and there were concurrent findings of both Courts in India that there was no valid marriage between *J B* and their mother and that they were consequently illegitimate. The first respondent was the son of *J. B* by a Hindu lady of the Chattri caste with whom he had admittedly gone through a marriage according to the strict Hindu rites, and when that lady died his father got him married to another lady of the same caste. On the death of *J. B.* in 1899 the first respondent obtained possession of the property in suit, and the appellant sued for it, the question being whether the appellant was an "issue" of *J. B* within the meaning of the word "*aulad*" as used in the codicil, and as such entitled to inherit *J B's* property. The first respondent contended that the appellant being illegitimate could not take under the terms of the codicil, that *J B* had been a Hindu from his boyhood to his death, and that he (the first respondent) being the only son of the first Hindu marriage which was a valid one, was the heir of his father, and, on the true construction of the codicil, entitled to the property in suit. By the codicil, dated the 15th of March, 1878, the testator, after reciting that his son *J B* "being not born of Khas Mahal, was not capable of the *gaddinashini* and the proprietorship of the *riasat*" continued,—"But he also being born of my loins it is incumbent on me that such means be provided as would enable him and his issue (*aulad*) to support themselves well and with respect" . . . . Accordingly

*Present:—*LORD ATKINSON, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

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the settlement is made as follows. "Rs. 4,000 per mensem, or Rs. 48,000 per annum" (the income derived from certain villages named) shall be continued to be paid by the proprietor of the *riasat*, the *locum tenens* of the *gaddinashin* for the time being and that amount shall be paid to *J. B.* and his issue (*aulad*) for generation after generation so long as the family (*khandan*) of *J. B.* and his issue (*aulad*) remain in existence. . . . . (3) for his life time *J B.* has a right to spend their money, but after his death from among his issue (*aulad*) one person (*jisko haq pahunchta howe*), to whom the right may go, shall be considered proprietor of this maintenance allowance, without division, as a rais. The other issue of the family of *J. B* shall be entitled to get food, raiment and other necessaries out of the monthly allowance (4) When there remains no descendant of the family of *J B* at any time the monthly allowance of Rs. 4,000 will be resumed and remain in proprietary possession of the proprietor of the *riasat*, the *gaddinashin*" The Court of the Judicial Commissioner held that "*aulad*" *primâ facie* meant legitimate issue, and dismissed the suit

Held (upholding that decision) that the case was not one where a gift is made by will of the corpus of a fund or a life interest in a fund to the "children" of the testator, or of another, as class There might be good reason in some such cases for holding that in India the word "children" includes illegitimate children. But here a succession of life interests from generation to generation is intended to be set up, the successor, or "proprietor," in each instance being vested with an absolute control of the income subject only to the duty of maintaining the the issue (*aulad*) of the family (*khandan*) of the first proprietor *J. B.* There was nothing on the face of the codicil to suggest that a meaning should be given to the word "*aulad*" different from its *primâ facie* meaning. To include illegitimate issue would bring into the line of succession not only the testator's illegitimate grand-children, but their illegitimate issue from generation to generation. Such a construction would render condition No. 4 rather unnecessary and would also defeat the whole purpose and object of the testator in establishing the succession of life interests Nor was there any reason for extending the meaning of the word "*khandan*," which ordinarily refers to the group of descendants who constitute the family of the proprietor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials

Held also, that the fair result of the evidence was that *J B* did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived, and that his father from the boy's youth upwards aided and encouraged him in those efforts. The testator treated his marriages with the two Chattri ladies as lawful marriages, and desired that others should so treat them, and consequently resolved to regard and treat the offspring of those unions as legitimate, and desired that they should be so treated and regarded by others, and that it was in this frame of mind he made the testamentary disposition in dispute Having regard to all the evidence in the case, and the provisions of the codicil itself the intention of the testator plainly was to treat the marriages of *J. B* with the two women of the Chattri caste as valid marriages and the issue of those marriages as legitimate issue

APPEAL from a judgement and decree (26th February, 1906) of the Court of the Judicial Commissioner of Oudh, which affirmed a judgement and decree (3rd January, 1905) of the Court of the Subordinate Judge of Gonda

The principal questions for determination on this appeal were (a) whether the appellant was an "issue" of one Jang Bahadur Singh deceased within the meaning of the word *aulad* as used in a codicil to the will of the late Maharajah of Balrampur, Sir Digbijai Singh, dated the 15th of March 1878, and (b) whether the appellant was entitled to inherit the property left by the said Jang Bahadur Singh

The facts of the case and the terms and conditions of the codicil, are sufficiently stated in the judgement of their Lordships of the Judicial Committee

The case for the appellant (plaintiff) was that Jang Bahadur Singh was by birth a Muhammadan that he married Najm un nissa by nikah, that the appellant and the respondents (defendants) 2, 3 and 4 were the issue of that marriage the appellant being the eldest, that a lawful marriage between Jang Bahadur Singh and the first respondent's (Ganga Bakhsh Singh's) mother was impossible and therefore Ganga Bakhsh Singh was an illegitimate son of Jang Bahadur Singh, that the appellant as the eldest of the legitimate issue of Jang Bahadur Singh was entitled to the whole of the property in suit both under the terms of the codicil, and according to the rule of primogeniture which regulates the succession to the taluqa of Balrampur and applied to the property in suit, that if that rule be held to be inapplicable the appellant and respondents 2 3 and 4 were entitled to the property under the Muhammadan law and the result would be the same even if Ganga Bakhsh Singh be held to be legitimate, and that if the appellant, his brothers and Ganga Bakhsh Singh were all held to be illegitimate the appellant was entitled to succeed according to conduct and custom

Ganga Bakhsh Singh's (the first respondent's) case was that Jang Bahadur Singh was not married to the appellant's mother, that Jang Bahadur Singh was not a Muhammadan by birth, and that if he was, he was brought up, lived and died as a Hindu, contracted a lawful marriage with Hansraj Kunwar, and therefore

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Ganga Bakhsh Singh was legitimate, and was entitled to the whole of the property in suit to the exclusion of the appellant and his brothers, who were illegitimate and could not succeed either under the codicil or by Muhammadan law or otherwise

The Subordinate Judge found that Jang Bahadur Singh, though presumably a Muhammadan by birth never in fact professed the Muhammadan religion, that the appellant and his brothers were the illegitimate sons of Jang Bahadur Singh and therefore not his heirs, that Jang Bahadur Singh was not born a Hindu, but that he all his life professed the Hindu religion, that neither the Hindu law, nor the Muhammadan law, nor the Succession Act governed the descent of his estate, but that the principles of justice, equity and good conscience applied, that by those principles the succession to Jang Bahadur Singh's estate should be decided under the circumstances in accordance with the rules of Hindu law by which Ganga Bakhsh Singh (the first respondent) was Jang Bahadur Singh's sole heir The Subordinate Judge also found that Balrampur was a Raj to which the rule of primogeniture applied, but that the rule was not applicable to an illegitimate son In accordance with these findings a decree was made dismissing the suit.

An appeal to the Court of the Judicial Commissioner was heard by Mr E CHAMIER (First Additional Judicial Commissioner) and Mr W F WELLS (2nd Additional Judicial Commissioner) the main judgement being delivered by the former, the latter concurring After stating the facts and the terms of the codicil, the judgement proceeded —

"The most important clauses so far as this case is concerned are the 3rd and 4th which are as follows — (3) For his life time Jang Bahadur Singh has a right to spend this money but after his death one of his *aulad* on whom the right may devolve *(jisko haq pahunchta howe)* shall be considered entitled to the monthly allowance without division as a rais, the other *aulad* of the family of Jang Bahadur Singh shall be entitled to get food raiment and other expenses out of the maintenance allowance and in addition to this the representative of Jang Bahadur Singh whoever he may be shall pay the marriage and funeral expenses of male and female children which may from time to time be required in the family of Jang Bahadur Singh and this rule shall continue to be observed in the family of Jang Bahadur Singh for generation after generation (4) When there remains no descendant *(aulad men se koi nasal baki na rahe)* of the family of Jang Bahadur Singh the monthly maintenance allowance of Rs 4,000 will be resumed and become the property of the owner of the taluqa' . . . .

The questions which we have to decide upon this codicil are firstly, whether the word *aulad* includes illegitimate as well as as legitimate issue, and secondly, what is the meaning of the words, '*jisko haq pahunchta howe*'

"It is part of the case of the plaintiff that if he and his brothers and the first defendant be all held to be illegitimate, the plaintiff as the eldest is entitled to possess on of the property according to 'conduct and custom.' It was contended that if all are illegitimate, the Maharaja must have been aware of their position and that therefore when he used the word *aulad* in the codicil he must have intended to refer or at least to include illegitimate issue *Primâ facie* the word *aulad* refers only to legitimate issue, and must bear the same meaning wherever it occurs in the codicil. There is in the codicil a distinct provision for the ultimate reversion of the property to the taluqa in case there should at any time be no representative of the family of Jang Bahadur Singh This is a strong indication that the Maharaja used the word *aulad* in the sense of legitimate issue, and there appears to be nothing in the codicil to suggest the contrary. There can be little doubt that the Maharaja believed that the issue of Jang Bahadur's marriage with Hansraj Kunwar would be regarded as legitimate If it is a fact that Jang Bahadur was married to the plaintiff's mother by *nikah* the Maharaja must have been aware of it, but if no *nikah* took place, the Maharaja must have known that the plaintiff and his brothers were illegitimate, and he could scarcely have intended that the property which he left to Jang Bahadur should on the latter's death descend to illegitimate issue by a Muhammadan woman, along with legitimate issue by a Hindu woman Such a collection of persons could not be called a family (*khandan*) Therefore it seems to me that if the plaintiff is held to be illegitimate he cannot succeed under the codicil As regard property in lists B and C it is quite certain that the plaintiff's case must fail if he is illegitimate, for the Muhammadan law of the Sunni sect does not recognize any right of succession to their father on the part of illegitimate children. I am therefore of opinion that the plaintiff's suit must fail in its entirety if he is held to be illegitimate"

On the question whether Jang Bahadur was by birth a Hindu or a Muhammadan, the appellate court held with the Subordinate Judge that he was a Muhammadan by birth.

As to whether Jang Bahadur was during his life a Hindu or a Muhammadan, the appellate Court, after discussing the evidence, said —

"It is evident that he was neither an orthodox Hindu nor an orthodox Muhammadan It appears to me he led a double life as was almost inevitable under the circumstances He no doubt called himself a Hindu and if he had any religion it was, as the Subordinate Judge says the popular idolatrous form of Hinduism but he is not proved to have been an orthodox Hindu and therefore it seems to me that if the plaintiff were found to be of legitimate birth, the circumstance that his father became a Hindu to the extent shown by the evidence would be no reason for passing over the plaintiff and giving the property to the first defendant"

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In the view which the Court took of the evidence on the question of the *nikah*, it held, however, that whether Jang Bahadur became a Hindu or not was not important; the crucial question being whether there was a *nikah* marriage between the plaintiff's mother and Jang Bahadur. As to that, after discussing the evidence, the appellate Court said :—

"The story of the *nikah* is full of improbability In the first place the plaintiff s mother, if not a khidmatgarin, was at any rate the daughter of a complete stranger of no social standing If the Maharaja or Imam Bandi had wished to marry Jang Bahadur to a Muhammadan girl there would have been no difficulty in arranging a marriage with a respectable family as in the case of the Hindu marriages One of the plaintiff's witnesses, Ram Prasad, No 11, suggests that there was a big tamasha or show, at the marriage that there was music; 'that balloons were sent up' but the rest of them make out that the marriage was a very quiet affair His first marriage is probably the most important event in a Muhammadan boy's life and it is inconceivable that Jang Bahadur should have been married to the plaintiff's mother in the manner described by the plaintiff's witnesses It is also most improbable that the Maharaja would have arranged for Jang Bahadur to marry the first defendant's mother, a respectable Hindu girl if Jang Bahadur had been solemnly married to a Muhammadan girl a year or two before It is certain that a *nikah* if it took place, could not have been kept secret The only well proved fact which tells in favour of the alleged *nikah* is the treatment of the plaintiff and his brothers by the Maharaja, but it is evident that for some reason or other the relations between Jang Bahadur and the plaintiff s mother were countenanced by Imam Bandi The two women lived together in the same house for over 20 years The Maharaja was a constant visitor at the house He may have become fond of the boys or he may have been induced to be kind to them by Imam Bandi However that may be the plaintiff has in my opinion failed to adduce reliable evidence of the *nikah*, and I think it is impossible to infer the existence of a lawful *nikah* from such cohabitation as has been proved, or to presume that the plaintiff and his brothers are legitimate from the conduct or statements of Jang Bahadur I find that the *nikah* has not been proved

"In this view of the case it is not necessary to express any opinion upon the question whether the first defendant should be regarded as a legitimate son His mother was married to Jang Bahadur at the instance of the Maharaja who must have known that the plaintiff and his brothers were illegitimate

"Under these circumstances it cannot be supposed that when the Maharaja wrote that the villages devised to Jang Bahadur should on his death devolve upon the child *jisko haq pahunchta howe* (to whom the right may accrue) he intended that the villages should devolve upon the plaintiff, and that the first defendant should be entitled to no more than food, raiment and other necessary expenses

"As regards the property in lists B and C it is sufficient to say that inasmuch as an illegitimate son cannot under the Sunni law succeed to his father,

the plaintiff, who has been found to be illegitimate, has no right to that property"

The appeal was accordingly dismissed.

On this appeal—

Sir R. Finlay, K.C., and *B. Dube*, for the appellant, contended that Jang Bahadur was by birth a Muhammadan, and he could not, and did not, after renouncing Muhammadanism become a member of the Chattri caste under the Hindu law and usage. No one could become a member of any high "caste" among Hindus except by birth. He could only have become a Sudra at best. A man could not become a Hindu by merely adopting the Hindu religion and calling himself a "Hindu;" and no amount of belief in the Hindu religion could bring a man within any Hindu caste, except possibly the Sudra caste. Again, a Hindu marriage to be valid must be between persons of the same caste. Reference was made to Mayne's Hindu Law, 7th edition, pages 105, 106 and 107 (paragraphs 87, 88 89); Tagore Taw Lectures (1878) by Guru Das Banerji, Hindu Law, Chapter on Marriage and Stridhan, pages 68, 74; *Padam Kumari* v. *Suraj Kumari* (1); *Bai Kashi* v. *Jamnadas Mansukh* (2); *Sespuri* v. *Dwarka Prasad* (3); *Melaram Nudial* v. *Thanooram Bamun* (4); *Narain Dhara* v. *Rakhal Gain* (5); and the Marriage Act (III of 1872), section 2. The marriage of Jang Bahadur with Hansraj Kunwar was therefore invalid, and the first respondent (Ganga Bakhsh Singh) was illegitimate. It was contended also that the word *aulad* in the codicil included illegitimate children, see Wilson's Glossary, definition of "aulad." The word was not to be read by the light of the English decisions in which the word "children" must be taken to be legitimate children. *Barlow* v. *Orde* (6) *per* Lord Westbury; and *Skinner* v. *Naunihal Singh* (7) were referred to. The evidence showed that all five of the children were treated equally by the testator. But the appellant's case was not rested on the treatment of the children, but on the question of law that Jang Bahadur could not be a Hindu, so as to make a valid marriage with a woman of the Chattri caste. In the higher castes of Hindus illegitimate descendants do not succeed where there are legitimate

(1) (1906) I. L. R., 28 All., 458.
(2) (1912) 16 Indian Cases, 133.
(3) (1912) 16 Indian Cases, 222.
(4) (1868) 9 W. R., 552.
(5) (1875) I. L. R., 1 Calc., 1.
(6) (1870) 13 Moo. I. A., 277 (307, 312).
(7) (1913) I. L. R., 35 All., 211; L. R., 40 I. A., 114.

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issue, but in the case of all the issue being illegitimate then the eldest son would have the property as rais If the testator had desired to exclude illegitimate descendants he would have said so clearly Therefore by the use of the word "aulad," it is submitted, he did not exclude them At any rate he did not intend to leave them with no provision for their maintenance On the question of what law should govern the case, it was contended that it must be decided by the law of justice, equity and good conscience The question was what did that law demand? Under the present division the eldest son had nothing, not even maintenance, that was not in accordance with equity and good conscience

De Gruyther K C, and *E U. Eddis*, for the first respondent, contended that the case now made was different from that made in the plaint, where the appellant claimed to succeed to the property in suit by the custom of primogeniture as the eldest legitimate son of Jang Bahadur, or in the alternative, to a fourth share equal to the share of each of his three brothers, the second, third and fourth respondents But the appellant could only succeed as to the either part of the property on proof of a valid marriage according to the Muhammadan law between Jang Bahadur and the appellant's mother, and there were concurrent findings of both Courts in India that there was no such valid marriage, and the appellant was therefore illegitimate according to the Muhammadan law applicable to Sunnis The meaning of *aulad* in the ordinary sense was nothing more than "children" which in England would be taken to mean "legitimate children" [*Sir R Finlay, K C*—*Aulad* includes both legitimate and illegitimate children if there are legitimate children, they would exclude those who were illegitimate. but if there are none legitimate, all, though illegitimate, can inherit] The terms of the codicil, it was submitted, excluded illegitimate issue The "descendants" are called *aulad*, which should have the same meaning throughout the codicil It means legitimate issue The words "to a man and his issue (*aulad*) from generation to generation" was the common form in India of creating an estate of inheritance The object of the codicil was to provide for Jang Bahadur, and not to provide maintenance for his illegitimate children who had no claim on the testator. The Maharaja

had during his life time given large estates to Jang Bahadur out of which he could have provided for his illegitimate issue, and a settlement was made on Imam Bandi with power to appoint which was exercised by her, and the appellant and his brothers were so provided for Ganga Bakhsh Singh was believed by Jang Bahadur to be his legitimate son, who would succeed him as indeed he did Jang Bahadur was, according to the evidence, treated by the Chattri caste people, as a member of the caste. The authorities cited to show that the marriage of Jang Bahadur and Hansraj Kunwar was invalid were not to the point They showed that the marriage of a member of one caste to one of another caste was not valid, they do not decide that the marriage of a man who was recognized by the Chattri caste as a member with a Chattri woman was illegal

The law applicable to the testator was the Hindu law, and that must certainly be the law by which he intended the will and codicil to be construed The word *khandan* (family) used in the codicil must mean Hindu family which would not include illegitimate children who are not recognized by the Hindu law for the purpose of succession A Hindu supposes legitimacy of issue and desires to keep the family property joint Here those principles are intended to be followed by giving the property to one (legitimate) and so providing against partition. Reference was made to cases laying down rules for the construction of Hindu wills *Soorjeemoney Dossee* v *Denobundoo Mullick* (1), *Muhammad Shumsool Hooda* v *Shewukram* (2), and *Radha Prasad Mullick* v *Rani Mani Dassee* (3) The testator believed that Jang Bahadur's marriage with Hansraj Kunwar was valid and that Ganga Bakhsh Singh was legitimate, and it was submitted intended legitimate issue to inherit The construction suggested for the appellant would make heirs, not only of the legitimate and illegitimate issue of Jang Bahadur, but also of the legitimate and illegitimate descendants of such issue of whatever religion they might be The testator would never have intended that Even if *aulad* included both legitimate and illegitimate issue, the first respondent as being legitimate would exclude the appellant. It was submitted that Jang

(1) (1857) 6 Moo. I A 526 (550) (2) (1874) L. R. 2 I A., 7 (14)
(3) (1908) I L R 35 Calc 896 L R 35 I A 118

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Bahadur was practically a Hindu, and adopted the Hindu religion and usage and to apply that law would be in accordance with justice equity and good conscience Reference was made to *Abraham* v *Abraham* (1), *Ghosal* v. *Ghosal* (2), Mayne's Hindu Law, 7th edition, pages 71, 72 where that case was referred to and J N Bhattacharji's "Hindu Castes and Sects" page 5, and Gurudas Banerji's Hindu Law 'Marriage and Stridhan 2nd edition, page 73, as showing that it was not impossible to obtain admission to caste

Sir R Finlay, K C, in reply There was no evidence to show that the testator believed that the marriage of Jang Bahadur and Hansraj Kunwar was valid The Subordinate Judge treated the question as one of religion, and ignored its relation to caste The evidence of the respondent showed he was not recognized as a member of the caste Jang Bahadur could never have been a member of the Chattri caste Reference was made to Wilkins' "Modern Hinduism" pages 262 263 and Sherring's Hindu Tribes and Castes,' Introduction pages xxii and xxiii

1913, December 10th —The judgement of their Lordships was delivered by Lord ATKINSON—

This is an appeal from a judgement and decree, dated the 26th of February, 1906 of the court of the Judicial Commissioner of Oudh which affirmed a judgement and decree, dated the 3rd of January, 1905, of the court of the Subordinate Judge of Gonda, dismissing the plaintiff s suit

The action out of which the appeal arises was instituted on the 3rd of April, 1902, by the plaintiff as eldest son and heir of his father Jang Bahadur Singh, by a Muhammadan woman, claiming to recover the possession of the several villages mentioned in the schedule annexed to the statement of claim, the same forming part of an estate called the Balrampur estate, which had been bequeathed to the plaintiff's father by his, the plaintiff's paternal grandfather, the Maharaja of Balrampur, by a codicil, dated the 15th of March, 1878, to the last will of the Maharaja Possession of these villages had been taken in the year 1899 by the first defendant, and since then retained by him. Mesne profits were claimed in respect of this possession, and a claim was added to recover possession

(1) (1863) 9 Moo. I A, 198 (239) (2) (1906) I L. R 31 Bom 25 (30)

of the immovable and movable property mentioned in schedules B and C, also annexed to the statement of claim, or in the alternative the plaintiff's legal share thereof, on the ground that the same was property acquired by the plaintiff's said father, with an additional claim for further relief

The first defendant Bhaiya Ganga Bakhsh Singh, filed a written statement alleging that the plaintiff was the issue of a Muhammadan woman with whom his, the said defendant's father, Jang Bahadur Singh, had had illegal intercourse as were also the defendants numbered 2, 3 and 4 and that her *nikah* had never taken place, that his father followed the Hindu religion bigotedly, and was a Hindu from his boyhood up to his death; that he married for the first time a Hindu lady of a Surajbansi Chhattri family, that the defendant No 1 was the only child of that marriage, is the only legitimate son and heir at law of his father, and is consequently under the provision of the said codicil entitled to the allowance therein mentioned

The plaintiff replied traversing the several allegations contained in this and the other written statements filed by other defendants and upon these pleadings the eight issues were knit (*) A vast body of evidence was given bearing upon each of these issues Many of them are no longer of importance on this appeal, which is the ultimate stage of the litigation. The real questions now in dispute are, first, the proper construction of the language of this codicil of the 15th of March, 1878 and second the actual intention which the Maharaja desired to effect in executing it

*(1) Was Jang Bahadur a Muhammadan and is succession to his estate governed by the Muhammadan law?

(2) Are the plaintiff and the defendants 2 3 and 4 Jang Bahadur's legitimate sons and entitled to his estate under Muhammadan law (Sunni School)?

(3) (a) Does the codicil of the 15th of March 1878 entitle the plaintiff to succeed to Jang Bahadur's estate to the exclusion of his brothers (defendants 2 3 and 4) on the score of seniority in years? (b) Does the rule of primogeniture obtain in the family of the Maharaja of Balrampur? If so does the custom apply to the estate left by Jang Bahadur? (c) Is the plaintiff otherwise entitled to Jang Bahadur's estate to the exclusion of defendants 2 3 and 4?

(4) Did Jang Bahadur live and die a Hindu and is succession to his estate governed by the Mitakshara school of Hindu law? If so is the defendant 1 Jang Bahadur's legitimate son and sole heir?

(5) If the plaintiff and his brothers (defendants 2 3 and 4) be the illegitimate sons of Jang Bahadur and the defendant 1 (Ganga Bakhsh) his legitimate

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The facts, so far as material to the decision of these questions, are as follows. The plaintiff is the first-born son of his father, and the defendants 2, 3, and 4 are his brothers, sons of Jang Bahadur Singh by the Muhammadan woman already mentioned It has been found as a fact by both the Courts before which this case has come, that no ceremony of marriage was ever gone through between Jang Bahadur Singh and this woman, that she was his mistress, not his wife, and that, consequently, the plaintiff and his brothers are illegitimate. The appellant accepts this finding as conclusive on this point. The first defendant is the son of Jang Bahadur by a Hindu lady of the Chhattri caste with whom he had, admittedly, gone through the ceremony of marriage according to the strict Hindu rite

The validity of this marriage is impeached by the plaintiff upon the ground that at the time it was celebrated Jang Bahadur was neither a Hindu nor a member of the Chhattri caste, and that consequently the first defendant is, like the plaintiff and his brothers, illegitimate The issue thus raised necessitated a somewhat lengthy examination of the life-history of Jang Bahadur. He was, as already mentioned, the son, born in the year 1846, of a rather distinguished man, a Hindu by religion of the Junwar Chhattri caste, Sir Drigbijai Singh, Maharaja of Balrampur, by a Muhammadan mistress named Imam Bandi, and was therefore as held by both the courts abovementioned, a Muhammadan by birth. This decision is also accepted by the appellant

The Subordinate Judge finds that " Jang Bahadur was brought up, not as a Muhammadan under the influence of his Muhammadan mother, but by his Hindu father in the religion of Hindus; that he

son, does the plaintiff possess the right of inheriting the whole estate by virtue of the codicil and custom put in issue in issue (3) or of inheriting an equal share in the estate with defendant 1 ?

(6) If the plaintiff and defendants 1, 2, 3 and 4 be all illegitimate sons of Jang Bahadur, is the plaintiff entitled according to the codicil of the 15th of March, 1878, and the custom referred to in paragraph 13 of the plaint, to the whole of the property in suit, or is he entitled in the alternative to share Jang Bahadur's property equally with defendants 1, 2, 3 and 4 ?

(7) If Jang Bahadur did not die either a Hindu or a Muhammadan what would be the rights of the parties in regard to succession to his estate ?

(8) Did the defendant 1 get the properties mentioned in list C attached to the plaint on Jang Bahadur's death ? What is their value ?

never professed the Muhammadan religion and was never a Muhammadan in fact, that *after he was able to make a choice* he did not choose the religion of Islam but on the other hand lived and died in the faith of Hinduism, that he was throughout his life a follower of the popular idolatrous form of Hinduism, a form directly antagonistic to the cardinal principles upon which the religion of Islam is founded," and he (the Judge) "came to the conclusion that as Jang Bahadur was never throughout his life a Muhammadan, the Muhammadan law did not regulate the succession to his estate, and as he was not a Hindu by birth neither did the Hindu law regulate it, that neither of these laws nor yet the Indian Succession Act governed him at his death, and that according to the principles of justice equity and good conscience, and by the application of so much of the Hindu law as was applicable to the case Ganga Bakhsh Singh, the first defendant, was his father's legitimate son and sole heir"

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The court of the Judicial Commissioner, whilst abstaining from pronouncing any definite opinion on the legitimacy of the first defendant, gave in the following passage of their judgement a sketch of the status, life and character of Jang Bahadur Singh, which, though it differs to some extent from that of the Subordinate Judge, is, in their Lordships' view of the evidence fairly accurate It runs thus —

Jang Bahadur belonged to no caste and even if the issue of his marriage with Hansraj Kunwar should be held to be legitimate a point on which I express no opinion it is clear that the Hindu community at Balrampur treated the validity of the marriage as open to question The Subordinate Judge has cited several authorities to show that the Hindu religion admits proselytes of all kinds The truth of this is indisputable but it is equally true that the admission of a proselyte and his descendants into the society of orthodox Hindus is a very slow process The defendant's witnesses hit off the position exactly when they say that they might eat with Jang Bahadur's family if they persevered in their Hindu habits and maintained their character for several generations (*see* the evidence of defendant's witnesses nos 9 and 10) In two parts of one and the same house Jang Bahadur had a Muhammadan and a Hindu family and seems to have been on equally affectionate terms with both He ate food in English Hotels and Railway Refreshment rooms drank gin and kept fowls and pigs It is evident that he was neither an orthodox Hindu nor an orthodox Muhammadan It appears to me that he led a double life as was almost inevitable under the circumstances He no doubt called himself a Hindu and if he had any religion it was as the Subordinate Judge says the popular idolatrous form of Hinduism but he is not proved to have been an

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orthodox Hindu and therefore it seems to me that if the plaintiff were found to be of legitimate birth the circumstance that his father became Hindu to the extent shown by the evidence would be no reason for passing over the plaintiff and giving the property to the first defendant "

It has been urged on behalf of the respondents that the Court of the Judicial Commissioner was mistaken in supposing that Jang Bahadur kept his two families in two sides of the same house that in truth and fact, he kept them in two different houses This is really a small matter and does not affect the general accuracy of the passage

A vast body of evidence was given describing in great detail the participation of Jang Bahadur Singh on many occasions in the most solemn rites and ceremonies of the Hindu religion It was proved by many witnesses that he wore somewhat ostentatiously the indu tilak on his forehead, that he was invested by his father with the sacred thread, that he kept a Hindu cook to cook his food &c The fair result of the evidence in their Lordships' opinion is that Jang Bahadur did his utmost to become an orthodox Hindu, and to pass as such in the society in which he lived, that his father, from the boys youth upwards, aided and encouraged him in those efforts and finally when he was only 15 years of age, procured a marriage to be celebrated with great pomp and rejoicing according to the strict Hindu rite between him and the already mentioned Hindu lady of the Chhattri caste Hansraj Kunwar.

This lady's family were apparently not well off and it was stated in evidence that the Maharajah gave to her brother Sheo Dayal a village to induce him to consent to the union This however, only proves the anxiety of the Maharajah to bring about the marriage No doubt the Maharajah did not attend the ceremony himself He allowed certain priests to perform for him those ceremonies properly performable on such occasions by a father, but the marriage cannot but be regarded as a somewhat bold attempt to force as far as possible the son's entrance into the ranks of a high (twice born) caste and it might well be that the father, as the Subordinate Judge thought, may have absented himself from the ceremony from motives of prudence. On the other hand it is difficult to believe that all the parties concerned Sheo Dayal, with his own sons and his daughters to get married, the

Maharajah with his position and distinction, the priests with their duties to their religion and office, and all those who assisted at the ceremony with their notions of what was due to their creed, would have promoted, or taken part in an elaborate public function if they knew that it could at best create *only* a *relation of permanent* concubinage, without hope or prospects of elevation into a worthier and more respected state. The evidence of Sheo Dayal is important in this connection. He said he went with two Pandits to visit the Maharajah, that he had learned that Jang Bahadur was a Muhammadan woman's son, that on his expressing his scruples about the contemplated marriage owing to this fact the Maharajah assured him that Jang Bahadur was a Hindu; that he (the Maharajah) held him (Sheo Dayal) by the arm and said: "From childhood I have got him suckled by a Brahman woman. He eats with me. He does puja, and his ways are the ways of a Hindu" Sheo Dayal further says that Jang Bahadur Singh wore a tilak of chandavan, that his cook was a Hindu, that he saw him sitting near the Maharajah at dinner, and that hearing and seeing this he, Sheo Dayal, consented to the marriage of his sister with Jang Bahadur. No doubt it is stated by another witness that the Maharajah did not sit at meals with this son, but unless this evidence of Sheo Dayal be an entire fabrication it bears additional testimony to the anxiety of the Maharajah to have his son accepted and treated as a Hindu. Hansraj Kunwar died in the Maharajah's life-time. Jang Bahadur performed all the obsequies proper to be performed according to the Hindu religion by a surviving Hindu husband. His father, in the year 1872, got him, then about 24 years of age, again married to another Hindu lady, a member of the same Chhattri caste, Raj Kali Kunwar, who survived him, and is the fifth defendant in this suit. There was the same publicity and pomp as on the occasion of the first marriage, the same religious ceremonial. The Maharajah absented himself on this, as he did on the former occasion, and got his duties performed vicariously in the same way. The sole issue of this second marriage was a girl. Both she and Bhaiya Ganga Bakhsh Singh married members of the Chhattri caste. Sir Robert Finlay insists that the law for many centuries has been that a Hindu must be born, not made, and he cited several

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authorities in support of that proposition On the other hand the treatises referred to by the Subordinate Judge (1) appear to tend in an opposite direction and the facts of this case show that in this matter of marriage the rules both of Hinduism and of caste were not, in this instance at all events strictly applied In the view their Lordships take it is unnecessary to express any opinion on the point The matter for decision in this case being the construction of a codicil to the Maharaja's will, the point is not what is the strict rule of the Hindu religion or the strict rule of the Chhattri caste but this namely what were the wishes and intentions of the testator as revealed by the language of that instrument, viewed through the light of the circumstances which surrounded him at the time he made it

It would be strange indeed if the man who had made it his special care to rear this son of his as a Hindu and had succeeded in marrying him to two high caste Hindu women, should intend or desire whatever might be the strict letter of the law, to place the offspring of these unions on the same level as the illegitimate children of his son s Muhammadan mistress and make them all equally the objects of his bounty

Much reliance was placed by the appellants upon the evidence of several witnesses, members of the Chhattri caste which was directed to show that they would not eat with Jang Bahadur Singh take betel leaves from him or recognize him as a member of that caste or of the Hindu religion and it was contended that the Subordinate Judge had not paid sufficient attention to this evidence or given it its due weight He has no doubt not commented upon it at any great length, but it would be quite unreasonable because of this to conclude that he had not fully considered it When the evidence is examined it will be found that the objection of many if not most of these witnesses, to eat with Jang Bahadur or to give him betel leaves &c., was due to the well known and undisputed fact that he was the illegitimate son of a Muhammadan mistress, rather than to the fact that he was not a genuine Hindu This is notably so in the case of the witnesses Kali Prasad and Jagdeo Singh

(1) Sir Monier Williams Religious thought and life in India ' Part I, page 57, Sir Alfred Lyall s ' Asiatic Studies," pages 101, 104, W J Wilkin's

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The former said — I did not eat with Jang Bahadur because he was Imam Bandi s son and again — I won t eat *lachcha* food touched by Ganga Bakhsh I won t drink water from his hand because his grandmother was a Muhammadan and the latter said — I cannot eat food cooked by Raj Kali Kunwar because she was Jang Bahadur s wife but he proceeded to say that he would have no objection to eat with Jang Bahadur Singh if the Maharaja had asked him to do so and then he added the important statement, Jang Bahadur had offended the Maharaja by keeping a Muhammadan woman that woman had four sons she lived with Bandi as Jang Bahadur s mistress for 12 or 13 years until her death Babu Basudeo Lal an educated man and an advocate says — Jang Bahadur took particular care to put on the tilak more than a born Hindu would take because he was anxious to appear a Hindu that from the orthodox point of view he (the witness) did not consider him a Hindu but he could not say he was a Muhammadan because he professed to be a Hindu yet he gave not this fact but the fact that Jang Bahadur was of illegitimate birth as the reason for his unwillingness to take water from his hands

Hanwant Singh gives remarkable evidence to the same effect He said — I consider Jang Bahadur a Hindu He worshipped like a Hindu He did pilgrimages like a Hindu He gave dans to Brahmans like a Hindu His ways were those of a Hindu I saw him doing puja in the temple for the first time 30 years ago, and three times altogether I saw him feeding Brahmans at the temple Yet despite what he saw and his opinions on Jang Bahadur s religion, he says on the next page he would not eat with him because he was born of Imam Bandi nor would he eat with Ganga Bakhsh because presumably he was his father s son though he admits that if the latter persevered in his Hindu habits for two generations he would be taken into the *biradari*

These witnesses are fair specimens of those examined on this point Their evidence might be of importance if it was necessary *for their Lordships to determine whether or not the defendant* no 1 was the legitimate son and heir at law of Jang Bahadur The Subordinate Judge has determined that question in the

Modern Hinduism page 177 and Carnegy s Notes on the races tribes, and caste of Avadh (1868) page 37—40 and page 50

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affirmative. Their Lordships concur with the Court of the Judicial Commissioner in thinking that it is not necessary to determine it one way or the other for the purposes of the decision of this appeal, and they therefore abstain from expressing any opinion upon it. What is of importance, when one has to construe this codicil, and determine what was the testator's intention in making it, is to ascertain in what light he regarded his son, the marriages he helped that son to contract, and the issue that sprung from them.

Their Lordships are of opinion that the reasonable conclusion to be drawn from the evidence is that the Maharajah treated this son of his as a Hindu in religion, and desired that others should so treat him; so that he treated his marriages with the two Chhattri ladies as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate, and desired they should be so treated and regarded by others; and that it was in this frame of mind he made the testamentary disposition which is in dispute. It is lengthy, and in its material parts run thus:—

"Whereas I have a son, named Jang Bahadur Singh, born of an unmarried *Mahal*, and whereas he is not born of *Khas Mahal*, and it is against the usage of the family and against religion according to the Hindu Shastras, so he is not considered capable of *gaddinashini* and the proprietorship of the *riasat*. But he also being born of my loins, it is incumbent on me that such means be provided for support as would enable him and his (*aulad*) issue to support themselves well and with respect. Accordingly ever since the date of his birth till this day, whenever proper opportunity presented, grant was made for his support, and during my life-time I shall make grants according to my will whenever I shall deem it expedient to do so. But with a view to clearly make a provision beforehand in order that there may not remain any co-ownership and dispute relating to a part or the whole of my movable and immovable property, a property should be determined for Jang Bahadur Singh and his (*aulad*) issue for generation after generation in order that the conditions of the deed may remain binding in perpetuity. Accordingly the settlement is made as follows. It is this: Rs. 4,000 per mensem or Rs. 48,000 per annum shall be continued to be paid by the proprietor of the *riasat*, the *locum tenens* of the *gaddinashin* for the time being; and that amount shall be paid to Jang Bahadur Singh and his (*aulad*) issue for generation after generation as long as the (*khandan*) family of Jang Bahadur Singh and his (*aulad*) issue remain in existence."

DETAILS OF CONDITIONS.

"1. He shall not directly or indirectly take part in running the *riasat*, and shall also remain a well wisher of the *riasat*.

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"2. He shall not transfer his maintenance allowance to a stranger by sale, mortgage or otherwise

"3. For his life time Jang Bahadur Singh has a right to spend this money, but after his death from among his (*aulad*) issue one person (*jisko haq pahunchta howe*) to whom the right may go shall be considered proprietor of this maintenance allowance without division as a *rais*. The other issue of the family of Jang Bahadur Singh shall be entitled to get food, raiment and other necessaries out of the monthly allowance; * * *

"4. When there remains no descendant of the family of Jang Bahadur Singh, at any time, the monthly allowance of Rs 4,000 will be resumed and remain in the proprietary possession of the proprietor of the *riasat*, the *gaddinashin*.

"5. For the realization of the monthly allowance, a few villages with *jama* and names of demarcated villages and hamlets are selected, and a list of the same is annexed to the document. The *jama* of the selected (*tajwiz-shuda*) villages will be credited from year to year towards the aforesaid fixed monthly allowance of Rs. 4,000 Neither has the proprietor of the *riasat*, (*gaddinashin*,) power to realize the *jama* of the selected villages yielding Rs 48,000, including *mal* and *sewai*, from Jang Bahadur Singh or his descendants, nor is Jang Bahadur Singh or his family descendants competent to demand the fixed monthly allowance of Rs 4 000 from the *gaddinashin*, the proprietor of the *riasat*.

"6. The *jama* of the selected villages, a copy of which is attached to the document, shall be deemed the *jama*, including *mal* and *sewai* in perpetuity And the proprietor of the *riasat* for the time being shall have no power to increase or decrease the *jama* And Jang Bahadur Singh and his family descendants shall raise no excuse as to increase or decrease of the *jama*. And the proprietor of the *riasat* shall have no power to cancel the lease And Jang Bahadur Singh and his family descendants shall have no proprietary right against the proprietor of the *riasat*, except that of deriving benefit from the selected villages. Besides, Jang Bahadur Singh and his family descendants shall have no power to transfer the immovable property by sale or mortgage or otherwise But they shall continue in perpetuity to hold possession over the said villages.

"7. The villages selected for payment of the monthly allowance shall have their boundaries maintained according to the map of *had-o bast kistwar*. The proprietor of the *riasat* shall have no power to vary them contrary to it, nor shall Jang Bahadur Singh or his descendants have any."

Then follow the details of the villages leased out in perpetuity for the payment of the monthly allowance of Rs. 4,000. The testator then makes a bequest to Imam Bandi, the mother of Jang Bahadur, in the following words:—

"Besides, with a view to support the mother of Jang Bahadur Singh, I propose to fix Rs 1,000 per mensem, or Rs 12,000 a year for her personal expenses She that is the mother of Jang Bahadur Singh has power to spend the fixed allowance without interference by anybody else, and may, in her life time, make

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a will in favour of anybody whom she pleases and in respect of any good work she likes and it will be deemed liable to be acted upon And for the purpose of realizing the aforesaid annuity of Rs 12 000 a few villages mentioned below are given by way of *theka* with *jama* assessed thereon. The money will be realized from those villages from year to year "

He then gives a list of the villages out of which the Rs 12 000 was to be collected and proceeds to add —

"These few sentences have been put down to make provision for her support while in the enjoyment of health and possession of the five senses and out of my own pleasure and accord in order that they may be of use after me"

The testator died on the 27th of May, 1882 In or about January 1894, Jang Bahadur Singh became insane He so continued for several years and died on the 1st of October, 1899, leaving as his own the movable and immovable property mentioned in schedules B and C attached to the statement of claim. The first defendant as already mentioned immediately went into possession of the property mentioned in Schedule A and has since retained it

Jang Bahadur Singh was created by the codicil ancestor or first proprietor of the estate maintenance allowances somewhat resembling rent charges were charged upon it It was to be perpetual, impartible indivisible and incapable of being otherwise charged or encumbered and it was not to be the subject of any co-ownership On the death of Jang Bahadur a person styled the representative of the former was to succeed him as proprietor of this maintenance allowance without division " as a rais This proprietor was to be one of the issue of Bahadur Singh the other issue (*aulad*) of the family (*khandan*) of Jang Bahadur Singh being only entitled to get food and raiment out of the allowance In addition the marriage and funeral expenses of the male and female children of the family of Jang Bahadur Singh were to be paid The only indication given as to how the particular individual one of the issue of Jang Bahadur, who was to succeed him as proprietor of the allowance was to be ascertained is that contained in the words "on whom the right may devolve" The testator must have had in mind some law or rule which would apply to fix the succession What law could this high caste Hindu possibly have had in mind for such a purpose other than the Hindu law? That law, however, in the matter of succession to property, takes no account, in the three higher classes, of illegitimate descendants Sir Robert

Finlay, as their Lordships understood admitted this contention—at least to this extent that if when a successor came to be ascertained the class of beneficiaries contained both legitimate and illegitimate members the eldest legitimate male would by the Hindu law succeed, but where, as in the present case as he contended all the children were illegitimate, the eldest male amongst them should succeed, but by what law or rule he did not indicate It is difficult to suppose that if the testator intended all his grandchildren to be put upon the same level he would not have indicated some method by which the successor to his son should be selected. If he relied at all upon the Hindu law to select that successor it could only be because he wished it to be assumed that that law applied to some of the issue of his son and that could only be the case if those members of the issue were to be taken to be legitimate

At the date of this codicil Jang Bahadur was only about 30 years of age He had already had one son by his deceased Chhattri wife He had been married for some time to another Chhattri wife by whom it was quite possible he might have had male issue and it would have been quite in conflict with the whole tenor of the Maharajah's treatment of and conduct towards his son Jang Bahadur, to deprive by this codicil these marriages and the issue springing from them of the character and status he had striven to secure for them The court of the Judicial Commissioner came to the conclusion that the Maharajah thought these marriages of his son were valid and the issue of them legitimate However that may be it is clear, their Lordships think upon the whole of the evidence that he wished them to be so regarded by others Nothing would more surely have defeated that desire—than that he should by this testamentary instrument show that he himself regarded them in a wholly different light and placed the children of these marriages on an equality with those of a Muhammadan concubine The Maharajah has used the word '*aulad*" throughout this codicil to describe the issue of his son Jang Bahadur The court of the Judicial Commissioner has laid it down that this word *primâ facie* means legitimate issue This case is not one where a gift is made by will of the corpus of a fund or a life interest in a fund to the "children" of the testator or of another as a class There

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may be good reason in some such cases for holding that in India the word "children" includes illegitimate children but here a succession of life interests from generation to generation is intended to be set up the successor or 'proprietor' in each instance being vested with absolute control of the income subject only to the duty of maintaining the issue (*aulad*) of the family (*khandan*) of the first proprietor, Jang Bahadur Singh There is nothing on the face of the will to suggest that a meaning should be given to the word "*aulad*" different from its *primâ facie* meaning, but if it is to be read as including illegitimate issue, then it follows that the testator intended to bring into the line of succession not only his illegitimate grandchildren but their illegitimate issue from generation to generation Such a construction would render rather unnecessary the provision (No 4), that if no descendants of the family of Jang Bahadur remained, the monthly allowance should fall into the possession of the *gaddinashin* and would also seem to defeat the whole purpose and object of the testator in establishing this succession of life interests Nor do their Lordships see any reason for extending in this instance the meaning of the word "*khandan*" which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring, who from the necessities of the case cannot share in the family life or its worship or ceremonials

It has been strenuously urged by Sir Robert Finlay on behalf of the appellant firstly, that there would have been nothing easier for the testator, if he desired to exclude his illegitimate grandchildren from all benefit under this codicil than to have said so The question is, has he not done so by the use of the word "*aulad*" But even if this be not so, it was quite as easy for him to include them in the class described by the word "issue" as to exclude them from it so that the argument cuts both ways And it was in the second place contended that having regard to his interest in these children, he never could have intended to leave them unprovided for He undoubtedly did show some interest in them, but not a very keen interest, and it is by no means clear that he did not intend them to be provided for in the way they have been, in fact, provided for, namely, by being maintained by their grandmother Imam Bandi during her life, out of the income left to her by the

codicil. He enabled her by the exercise of the testamentary power over this income conferred upon her so to provide for them after her death. The income was large, Rs 1,000 per mensem She was a woman who at the date of the codicil must have been at least 45 years of age, her son Jang Bahadur being then 30 years of age The son's mistress and her children lived with her She, according to the evidence, helped to rear them It was scarcely conceivable that she should require Rs 12,000 per annum for her personal expenses alone The power of disposing of this income by will clearly showed that the testator had some object in view beyond providing adequately for her maintenance What more natural than that this income, handsome in amount and disposable by her will, should have been given to enable her to provide for her grandchildren. Their Lordships are therefore of opinion that having regard to all the evidence in the case and the provisions of the codicil itself, the intention of the testator plainly was to treat the marriages of Jang Bahadur with the two Chhattri women already mentioned as valid marriages, and the issue of those marriages as legitimate issue They think that the judgement appealed from was right and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly

Appeal dismissed

Solicitors for the appellant: *T L Wilson & Co*

Solicitors for the first respondent *Sanderson, Adkin, Lee & Eddis*

J. V. W.

APPELLATE CIVIL

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji.

1913 December, 15.

RAGHUNATH KUNWAR (PLAINTIFF) v. SHANKAR SINGH AND OTHERS (DEFENDANTS) *

Mortgage—Prior and puisne incumbrancers—Suit for sale by prior incumbrancer without impleading puisne incumbrancer—Subsequent suit by puisne incumbrancer for sale—Form of decree

Where a prior incumbrancer sues for sale on his mortgage and brings the mortgaged property to sale without making a puisne incumbrancer party to his

* First Appeal No 265 of 1911 from a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore dated the 11th of May 1911

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suit and thereafter the puisne incumbrancer brings a suit for sale on his mortgage the proper decree to be made in the second suit is to direct a calculation of what was due on foot of the prior incumbrance up to the date of the taking over of possession upon sale or, if that date cannot be ascertained the date of the sale and to declare the puisne incumbrancer entitled to redeem upon payment of the amount so ascertained *Dip Narain Singh* v *Hira Singh* (1) *Phulmani Chaudhrain* v *Nageshar Prasad* (2) and *Manohar Lal* v *Ram Babu* (3) referred to

THIS was a suit for sale on a mortgage dated the 5th of September, 1881 There had been a prior mortgage over the same property dated the 14th of January 1879 On this mortgage the mortgagees had instituted a suit for sale and had brought the mortgaged property to sale about the year 1896, but without making the puisne incumbrancer a party to these proceedings The plaintiff in the present suit contended that the mortgagee of the mortgage of 1881 should be entitled to call upon the purchaser to account for the profits from 1896 up to the present time and that if this were done it would be found that the mortgage of 1879 had been discharged so far as it affected the property which it was sought to sell in this suit The defendants on the other hand, contended that they were entitled to have an account taken of what would be due to them on their mortgage from the date thereof up to the present time, or that they should be allowed the amount of the purchase money which they paid with interest thereon. The court of first instance passed a decree which was not in accordance with the views of either the plaintiff or the defendants The plaintiff appealed to the High Court

Mr *B E O Conor* and Munshi *Damodar Das*, for the appellant

The Hon'ble Dr *Sundar Lal* for the respondents

RICHARDS C J and BANERJI, J —This and the connected appeal No 302 of 1911 arise out of a suit on foot of a mortgage, dated the 5th of September 1881 It appears that there had been a prior mortgage dated the 14th of January, 1879 On foot of this prior mortgage a suit was brought and a decree obtained and the property put up to sale some time about the year 1896 To that suit the mortgagee in the mortgage of 1881 was not made a party, and the substantial question in the present appeal is as to

(1) (1897) I L R 19 All 527 (2) (1911) I L R, 33 All, 870
(3) (1912) I L R 34 All 323

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the proper order that should now be made On behalf of the appellant it is contended that the mortgagee in the mortgage of 1881 should be entitled to call upon the purchaser to account for the profits from the year 1896 up to the present time, and that if this was done it would be found that the mortgage of the 14th of January 1879, had been discharged so far as it affected the property which is sought to sell in the present suit On the other hand, it is contended by the respondents in the present appeal who are the appellants in the connected appeal, that they are entitled to have an account taken of what would be due upon foot of their mortgage from the date thereof right up to the present time or in the alternative that they should be allowed the amount of the purchase money they paid in the year 1896 and interest thereon In our opinion the proper order to make in a case of this description is to direct a calculation of what was due upon foot of the prior incumbrance up to the date of the taking over of possession upon sale (or, if that date cannot be ascertained the date of sale) and the puisne incumbrancer should be declared entitled to redeem upon payment of the amount so ascertained We are clearly of opinion that the prior incumbrancer ought not to be called upon for an account of the profits which he has received subsequent to the sale This in principle was the view taken in the case of *Dip Narain Singh* v *Hira Singh* (1) In the case of *Phulmani Chaudhrain* v *Nageshar Prasad* (2) accounts were directed to be taken upon this basis in order to enable the Court to make what it considered a proper decree See also the issues referred in *Manohar Lal* v *Ram Babu* (3) The real principle upon which in our opinion the decree should be drawn up is to place the puisne incumbrancer, whom the prior incumbrancer neglected to make a party, in as nearly as possible the position he would have been in if he had been made a party to the suit of the prior incumbrancer This principle, we think, is carried out in making the order in the form indicated above. In the present case the court below has declared what was the proportionate amount due on account of the prior mortgage (having regard to the value of the property now sought to be sold as compared to the value of the property comprised in the prior mortgage) This we think is correct It has allowed

(1) (1897) I L R., 19 All., 527 (2) (1911) I. L R., 33 All., 370
(3) (1912) I L R, 34 All 323, (330)

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interest up to the date of the taking of possession by the auction purchaser on the sale in 1896. This we think is quite correct, and we accordingly dismiss the appeal with costs. We extend the time for payment by the plaintiffs to four months from this date, and we direct that, upon such payment being made, the defendants will have a further period of two months for payment of the amount so paid by the plaintiff as well as the amount due on foot of their own mortgage, and to this extent the decree of the court below is varied.

Appeal dismissed.

Before Mr Justice Tudball and Mr. Justice Ryves

1913 December, 16.

RAM MANORATH SINGH AND OTHERS (PLAINTIFFS) *v.* DILRAJI KUNWARI, (DEFENDANT) *

Act No. I of 1877 (Specific Relief Act), section 42—Joint Hindu family—Widow alleged to be in possession of part of the joint property under a family arrangement—Suit for declaration of rights of other members of the family.

Under a deed of compromise the name of the widow of a member of a joint Hindu family was entered in the place of that of her husband and she was put in possession of the property that stood in his name. On an application being made for partition of one of the villages, the widow also applied for partition of the share which stood in her name. The plaintiffs objected on the ground that she was not entitled to partition, and they were referred to the Civil Court to have their rights established. They then sued for a declaration that the deceased died while living jointly with themselves, that the widow was not in possession as the heir of the deceased and that she was not entitled to obtain partition. Section 42 of the Specific Relief Act was set up in defence. *Held*, that inasmuch as the possession of the defendant was ultimately admitted and the real dispute between the parties was one as to the nature of the possession of the widow, section 42 of the Specific Relief Act did not bar a suit for declaration of title.

THIS was a suit for a declaration that the defendant's husband had died whilst he was a member of a joint Hindu family with the plaintiffs, and that although the defendant's name was recorded in the revenue papers as owner and in possession of a certain portion of the family property, this was merely *solatii causâ* and in virtue of family agreement, dated the 19th of May, 1905. The plaintiffs also, although relying on the said agreement, pl[illegible] that they were themselves in fact in possession of [illegible] property [illegible] question. The court of first instance found [illegible]

* First Appeal No. 93 of 1913 from a decree of [illegible] Additional Subordinate Judge of Gorakhpur, dated th[illegible]

were not in possession and that the suit was barred by section 42 of the Specific Relief Act, 1877 The plaintiffs appealed to the High Court. In appeal, however, they resiled from the position that the defendant was not in possession and, claiming only a declaration that she was not entitled to partition, contended that section 42 of the Specific Relief Act did not bar the suit

The Hon'ble Dr *Sundar Lal* and Pandit *Vishnu Ram Mehta*, for the appellants

The Hon'ble Dr *Tej Bahadur Sapru* and Munshi *Iswar Saran*, for the respondent

TUDBALL and RYVES, JJ —The plaintiffs appellants brought a suit in the court below for a declaration in the following circumstances The defendant, Musammat Dilraji Kunwari is the widow of one Sohrat Singh The plaintiffs' case is that Babu Sohrat Singh and they themselves were members of a joint Hindu family, that Sohrat Singh died while he was joint, that his widow Dilraji Kunwari applied for mutation of names in her own favour in respect of that property which stood in the name of Sohrat Singh, that her application was contested, that the parties came to a compromise dated the 19th of May 1905, which was duly registered, under which Dilraji Kunwari's name was recorded in the place of that of her husband's, and that on an application for partition having been made by a co sharer in one of the villages Musammat Dilraji Kunwari also applied for partition of the share which stood in her name The plaintiffs objected to her application on the ground that she was not entitled to partition and the Revenue Court referred them to the Civil Court to obtain a declaration on the point Hence the present suit In paragraphs 2, 3, 4 and 5 of their plaint the plaintiffs, while setting out the above facts, also alleged that they were in actual possession of the share and that the defendant was not in possession of it although they relied on the document of the 19th of May, 1905 mentioned above, in which it was set forth that she was to remain in possession However in their relief they asked for a declaration that Babu Sohrat Singh died while living jointly with themselves, that the defendant did not get possession of the property as the heir of her husband nor was she in possession as such, and that her name was recorded in the *khewat* in accordance with the agreement of the

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19th of May, 1905, and that she had no right to obtain a partition. The case for the defendant was that Sohrat Singh was separate from the plaintiffs; that he was owner of the property which stood in his name, and that the defendant was in possession as the widow of a separated Hindu; that the plaintiffs were not in possession at all, and that no suit for a declaration could lie in view of the provisions of section 42 of the Specific Relief Act The court below went solely into the question of the actual possession. It found in favour of the defendant and held that she was in possession, and that the suit, therefore, failed by reason of the terms of section 42 of the Specific Relief Act. The memorandum of appeal contains two grounds; (1) that the plaintiffs have proved that they are in possession of the property in suit; (2) that the suit is not barred by section 42 of Act I of 1877. Dr. *Sundar Lal* on behalf of his clients does not press the first ground of appeal and admits that it may be taken for granted that the defendant is in actual possession of the property in suit. But he still maintains that the suit is not barred by section 42 of the Specific Relief Act, for this reason that the real dispute between the parties is one as to the nature of the possession of the widow; because this suit has arisen out of partition proceedings and the sole object of the plaintiffs is to have it declared that the widow was in possession of the property, not as heir of a separated Hindu but as a widow of a deceased member of a joint Hindu family in lieu of maintenance, and as such she was not entitled to obtain partition of the property. In our opinion, the possession of the defendant being clearly admitted, the real dispute between the parties is as to the nature of the possession of the lady. The lower court has not gone into the merits of the case. The plaintiffs no doubt have merely themselves to thank for the decision arrived at by the court below, because, although they took their stand on the compromise, dated the 19th of May, 1905, which distinctly awarded possession to the lady, they thought it advisable to state that she was not in possession. In these circumstances it is clear that the court below must go into the merits of the case, as the suit is not barred by the provisions of section 42 of the Specific Relief Act. The plaintiffs are not at present entitled to possession and are not bound to sue for possession. We, therefore, allow

the appeal, set aside the decree of the court below, and remand the case to that court with directions to re admit it on its original number in the file and proceed to hear and decide it according to law The costs of this appeal will abide the result

Appeal decreed and cause remanded

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RAM MANORATH SINGH v DILRAJI KUNWARI

REVISIONAL CRIMINAL.

Before Mr Justice Ryves

RAM BHAROS AND OTHERS v BABAN *

1914 *January* 2

Criminal Procedure Code, section 203—Complaint—Dismissal of complaint—Second complaint in pari materia—*Same Court*—*Jurisdiction*

Where the question is as to the competence of a magistrate to entertain a second complaint *in pari materia* with a former complaint which has been dismissed under section 203 of the Code of Criminal Procedure it is not necessary that both complaints should be before the same person but before the presiding officer of the same court

Queen Empress v *Adam Khan* (1) distinguished *Queen Empress* v *Umedan* (2) and *Emperor* v *Kejmer* (3) referred to

THE facts of this case were as folows

On the 20th of September 1913, Musammat Kalia the wife of one Baban made a report at the police station charging six persons with having assaulted her husband On the 2nd of October, 1913 Nachko, the brother of Baban, filed a complaint in the court of the District Magistrate against nine persons with respect to the same assault on Baban as had been reported by Musammat Kalia The District Magistrate forwarded Nachko's complaint to Mr White who was the Sub Divisional Officer, for disposal Mr White ordered an inquiry under section 202 of the Code of Criminal Procedure, and on the 18th of October, 1913 he dismissed Nachko's complaint under section 203 of the Code On the 22nd of October 1913, Baban made a complaint against six out of the nine persons named by Nachko and alleged the same facts as reported by Musammat Kalia Mr White ordered that the police papers and the papers in Nachko's case should be put up along with Baban's complaint on the 28th of October 1913 Before that date Mr White ceased to be the

* Criminal Revision No 1007 of 1913 from an order of Suraj Din Bajpai, Magistrate, first class of Mirzapur dated the 11th of November 1913

(1) (1899) I L R 22 All 106 (2) Weekly Notes 1895, p 86

(3) (1913) I L R 36 All, 53

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Sub-Divisional Officer and was replaced by Mr Suraj Din Bajpai. Mr. Suraj Din Bajpai took up the case and ordered process to issue against the accused on the 11th of November, 1913

Against this order the accused applied in revision to the High Court

Mr *D R Sawhny*, for the applicants

Munshi *Parmeshwar Dayal*, for the opposite party

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

RYVES, J —On the 20th of September 1913, Musammat Kalia the wife of one Baban, made a report at the police station charging six persons with having assaulted her husband. On the 2nd of October, 1913, Nachko, the brother of Baban, filed a complaint in the court of the District Magistrate against nine persons with respect to the same assault on Baban as has been reported by Musammat Kalia The District Magistrate forwarded Nachko's complaint to Mr White, who was the Sub Divisional Officer, for disposal Mr White ordered an inquiry under section 202 of the Code of Criminal Procedure, and on the 18th of October, 1913, he dismissed Nachko's complaint under section 203 of the Code On the 22nd of October, 1913, Baban made a complaint against six out of the nine persons named by Nachko and alleged the same facts as reported by Musammat Kalia Mr White ordered that the police papers and the papers in Nachko s case should be put up along with Baban's complaint, on the 28th of October, 1913 Before that date Mr White ceased to be the Sub Divisional Officer and was replaced by Mr Suraj Din Bajpai Mr Suraj Din Bajpai took up the case and ordered process to issue against the accused on the 11th of November, 1913 Against that order this application in revision has been filed on the ground that according to the decision of this Court in *Queen Empress* v *Adam Khan* (1), Mr Suraj Din Bajpai had no jurisdiction to proceed with the case inasmuch as Mr White had already dismissed a complaint in the same matter The case of *Queen Empress* v *Adam Khan*, as stated by the learned Judges who decided it themselves, is only applicable to exactly similar facts. The learned Judges say —"We desire it to be distinctly understood that we decide nothing except the question actually

(1) (1899) I L. R., 22 All., 106.

raised by the facts in this case which is that when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it In that case the first complaint had been made in the court of an Honorary Magistrate who dismissed it under section 203 of the Code of Criminal Procedure A similar complaint against the same person was then made in the Court of a Deputy Magistrate Both the Honorary Magistrate and the] Deputy Magistrate were Magistrates of equal jurisdiction namely, Magistrates of the first class In this case at first sight there is undoubtedly a great similarity between the facts now before me and the facts in that case There is however, this distinction Nachko s complaint was disposed of by Mr White to whom it had been sent, because he was the Sub-Divisional Magistrate having jurisdiction over the place where the offence was alleged to have been committed He dismissed that complaint as stated above but when on the 22nd of O tober Baban p it in his complaint Mr White entertained it at any rate to this extent that he fixed a further date for its disposal Mr Suraj Din Bajpai took up the matter simply because he had become the Sub Divisional Magistrate and was thus seised of the case as the successor of Mr White In other words it was the same tribunal although the incumbent was a different individual In this view Mr Suraj Din Bajpai would not be precluded from entertaining Baban's complaint as has been held in *Queen-Empress* v *Umedan* (1) and other cases in the Court the last of which was decided by a Bench of which I was a member, on the 28th of November 1913 that is, Criminal Revision No 843 of 1913, *Emperor* v *Keymer* (2) But whether the ruling in I L R 22 All 106 is or is not distinguishable on the ground suggested it seems to me that this is certainly a case in which there should have been a magisterial inquiry It appears that on the 28th of September 1913 both the wife of Baban and Raghunath one of the men whom she charged with having assaulted her husband made counter complaints Nachko and Raghunath both filed complaints in court, apparently being dissatisfied with the action of the police Both cases were sent to Mr White for disposal He accepted apparently the report of the police and dismissed both cases This I think

(1) Weekly Notes 1895 p 66 (2) (1913) I L R 36 All 53

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is a case in which this Court may properly take action under section 437 of the Code of Criminal Procedure I, therefore, direct that Baban's complaint be returned to the learned District Magistrate and that he will either inquire into the same himself or will have it inquired into by some competent magistrate subordinate to himself If Mr White is still in the district it might be convenient for him to dispose of the matter

Further inquiry ordered

1914
January 13

Before Mr Justice Ryves and Mr Justice Piggott

GHURBIN KOERI *v* KHALIL KHAN AND OTHERS *

Criminal Procedure Code, sections 250, 537—Frivolous or vexatious complaint—Compensation—Procedure—Irregularity

A Magistrate, after recording the evidence for the prosecution and the statement of the accused, came to the conclusion that the complaint was unfounded and discharged the accused, and in the same order called upon the complainant to show cause, under section 250 of the Code of Criminal Procedure why he should not pay compensation to the accused Four days later after hearing the complainant, the Magistrate passed an order directing him to pay compensation

Held that the proceedings, though not strictly in accordance with section 250 of the Code were not so far at variance with its provisions as to fall outside the purview of section 537 *Jugal Kishore* v *Abdul Karim* (1) and *Emperor* v *Punamchand Hirachand* (2) followed *In the matter of the complaint of Safdar Husain* (3) distinguished

THE facts of this case were as follows —

A complaint was filed under section 506 of the Indian Penal Code After the examination of the prosecution witnesses and the statement of the accused were recorded the Magistrate came to the conclusion that the offence was not proved and that the complaint was frivolous and vexatious. The Magistrate discharged the accused and at the same time passed an order directing the complainant to show cause why compensation should not be awarded to the accused under section 250 of the Code of Criminal Procedure. Four days later he passed an order for the payment of compensation The complainant appealed, and the Sessions Judge, being of opinion that the order was bad in law, referred the case to the High Court

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*Criminal Reference No 1099 of 1913

(1) Weekly Notes, 1905, p 214 (2) (1900) 8 Bom. L. R., 847

(3) (1903) I.L.R., 25 All, 315

Dr *S M Sulaiman*, for the accused submitted that the order awarding compensation was not illegal as the provisions of section 250 of the Code of Criminal Procedure were complied with The Magistrate having called upon the complainant to show cause why he should not pay compensation in his order of discharge, had jurisdiction to hear and record complainant's objection and order compensation to be paid The subsequent proceedings were not separate and independent proceedings, but a part of and continuation of the former proceeding The case *In the matter of the complaint of Safdar Husain* (1) is distinguishable, inasmuch as in that case the Magistrate had in his order of discharge merely recorded his intention to proceed under section 250, but had not actually called upon the complainant to show cause till a subsequent stage In the present case the complainant was called upon in the order of discharge to show cause He relied on *Jugal Kishore* v *Abdul Karim* (2)

The erroneous procedure adopted, if it was erroneous, was at most a mere irregularity and not an illegality and was, therefore covered by section 537 of the Code of Criminal Procedure, *Emperor* v *Punamchand Hirachand* (3)

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown relied mainly on the wording of section 250 He submitted that the section compelled the Magistrate to incorporate his order for compensation in his order of discharge or acquittal When once the order of discharge or acquittal is written, signed and dated, the Magistrate ceases to have any jurisdiction in the matter Therefore an order passed subsequently for compensation is *ultra vires* The provisions of the section are peremptory, and non compliance with them is not a mere irregularity but an illegality and is such as could not be covered by section 537 of the Code of Criminal Procedure He relied on *In the matter of the complaint of Safdar Husain* (1) The power to award compensation is a special power given to the trying Magistrate and he can exercise it only in strict compliance with the provisions of that section

RYVES and PIGGOTT JJ —This is a reference by the Sessions Judge of Azamgarh recommending the interference of this Court

(1) (1903) I.L.R., 25 All, 315 (2) Weekly Notes, 1905, p 214

(3) (1906) 8 Bom L R 847

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in the exercise of its revisional jurisdiction with an order passed by a first class magistrate of that district One of the questions raised by the order of reference we are content to pass over briefly, with the remark that in our opinion the trying Magistrate was well within his jurisdiction in declining to proceed further with the application before him to have certain persons bound over to keep the peace The other question raised is whether the Magistrate s order directing the complainant Ghurbin to pay Rs 50 compensation to the opposite party under the provisions of section 250 of the Code of Criminal Procedure for having brought a frivolous and vexatious complaint against them was or was not passed without jurisdiction? The complaint was one under section 506 of the Indian Penal Code The trial came to an end on the 2nd of August 1913 After hearing all the evidence for the prosecution and examining the accused the Magistrate formed the opinion that the alleged offence was not proved and that the com plaint appeared to have been a frivolous and vexatious one If he had followed strictly the procedure laid down by law, he would then and there have informed the complainant of this and have asked him if he had any representations to make against an order directing him to pay compensation under the provisions of section 250 of the Code of Criminal Procedure Proceedings under this section are intended to be of a summary nature as is sufficiently in dicated by the direction that the order awarding compensation is to form part of the order of discharge or acquittal The court is bound to offer a complainant against whom it proposes to pass such an order, an opportunity of submitting any representations he may desire to make against the passing of the said order and it must record and consider such representations All this should be done before the passing of the final order of discharge or acquittal; and it was clearly not the intention of the Legislature that a complainant should be entitled to an adjournment in order to enable him to show cause ' much less to an opportunity of producing further evidence after all the evidence tendered by him in support of the allegations made in his complaint has been already taken at the trial of the case itself The difficulty which Magistrates seem to feel about applying the provisions of this simple and useful section is largely due to a tendency to

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substitute elaborate forms of procedure for the plain directions contained in the section itself In the case now before us the trying Magistrate incorporated in his order of discharge an order directing the complainant to show cause why compensation should not be paid to the accused persons He then adjourned the proceedings and after recording and considering the representations made by the complainant finally passed his order for the payment of compensation on the 6th of August 1913 the order of discharge having been signed and delivered four days previously In support of the Sessions Judge's reference it is contended that this order of the 6th of August 1913, was wholly without jurisdiction the Magistrate having become *functus officio* so far as this matter was concerned when he finally passed the order of discharge

There is a considerable amount of case law on the point We are content to refer to three cases as sufficient to explain the decision at which we have arrived The first is *Safdar Husain's* case (1) which is relied on by the Sessions Judge The peculiar feature of the case the record of which we have called for and examined is that the trying Magistrate in what was no doubt a well intentioned endeavour to comply with the provisions of the law as he understood them had involved himself in remarkable complications In his order of discharge he placed on record his intention to direct compensation to be paid and his reasons for this direction He then started a separate proceeding beginning with an order calling on the complainant to show cause against the order for payment of compensation and fixing a subsequent date for hearing the complainant's objections On the date thus fixed the complainant at once objected that the order embodied in the order of discharge was illegal because passed before the complainant's representation had been heard or considered and further that the Magistrate had now no jurisdiction to pass any other order Nevertheless the Magistrate proceeded with the matter and passed a final order making absolute his previous order on the subject of compensation On a reference by the Sessions Judge it was held by a Judge of this Court that the proceedings subsequent to the order of discharge were without

(1) (1903) I.L.R. 25 All 315

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jurisdiction, and that there had been no legal order under section 250 of the Code of Criminal Procedure.

The second case is one which clearly illustrates the point, that a failure to comply strictly with the letter of section 250, of the Code of Criminal Procedure, may amount to nothing more than an irregularity of procedure. It is the case of *Emperor* v. *Punamchand Hirachand* (1). There the trying Magistrate signed and dated his order of discharge, then recorded an order calling on the complainant to show cause why he should not be directed to pay compensation, recorded and considered the complainant's objections, and at once proceeded to pass an order that compensation should be paid. The entire proceedings followed one another on one and the same date, and it would certainly be difficult to contend that the mere interposition of the Magistrate's signature in one or more places before his signature at the foot of the final order, or the mere fact that the order for payment of compensation as finally recorded was not endorsed on the same sheet of paper as the order of discharge, would oust the jurisdiction of the court. The learned Judges of the Bombay High Court held that there had been a substantial compliance with the provisions of section 250, of the Code of Criminal Procedure, or at most an irregularity cured by section 537 of the same Code. It was in fact held that under the circumstances stated, the order for payment of compensation was substantially incorporated in and made a part of the order of discharge.

Finally we refer to the case of *Jugal Kishore* v. *Abdul Karim* (2). That case cannot be distinguished from the one now before us. There was an order of discharge in which was incorporated an order calling on the complainant to show cause why he should not be directed to pay compensation, this was followed by an adjournment. The complainant showed cause, but did not impugn the jurisdiction of the court to deal with the matter, and finally an order for payment of compensation was passed. The learned Judge of this Court held that, in spite of the adjournment, there had been in substance one single proceeding. In the words of the Bombay ruling, it could still be held that the order for compensation was "incorporated in and was part of the order of

(1) (1906) 8 Bom. L. R., 847. (2) Weekly Notes, 1905, p. 214.

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discharge' This seems to be the real test to be applied in cases of this sort The order of discharge itself showed that the Magistrate did not conceive himself to have finally disposed of the matter, and it contained in itself a direction (there was no such direction in *Safdar Husain's* case) that certain further proceedings should follow It is possible therefore to regard the order of the 2nd of August 1913 as a mere permission to the accused persons to leave the court and an intimation that their further attendance would not be required while the case itself still continued and was not concluded until the final order of the 6th of August 1903 was signed and delivered The trying Magistrate would have been better advised to have adhered strictly to the procedure laid down by law but it seems difficult to hold that the mere fact of an adjournment one granted after all for the convenience of the complainant himself and never objected to by him would distinguish this case from that of *Emperor* v *Punamchand Hirachand* (1) We have, therefore the authority of the Bombay ruling as well as that of a single Judge of this Court for holding that the proceedings under consideration were merely irregular and not without jurisdiction.

We decline to interfere let the record be returned

Order confirmed

FULL BENCH

Before Justice Sir George Knox Mr Justice Tudball and Mr Justice Piggott

1914 *January* 15

STAMP REFERENCE BY THE BOARD OF REVENUE

Act No II of 1899 *(Indian Stamp Act) section* 2 (15) *and schedule I article* 45*(c)—Stamp—Partition— Final order for effecting a partition*

Held that the words final order in section 2 clause (15) and article 45 *(c)* of schedule I to the Indian Stamp Act 1899 refer to the final order of the lowest court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed

THIS was a reference made by the Board of Revenue for the United Provinces under section 57 (1) of the Indian Stamp Act, 1899

The terms of the reference were as follows —

The question for determination is the meaning of the words final order in section 2 (15) and article 45 *(c)* of schedule I of the Stamp Act (*II of* 1899)

Civil Miscellaneous No 520 of 1913

(1) (1906) 8 Bom. L. R., 847

1914

STAMP REFERENCE BY THE BOARD OF REVENUE

The Board think that they refer to the final order of the lowest court of original jurisdiction empowered to give an order for effecting a partition, at the time it is passed, and not to the order of the highest court of appeal or to the order of the original court when the time for the appeal has elapsed and no appeal has been filed. This view has advantages from an administrative point of view, as, if the 'final order' to be stamped with the stamp required for an instrument of partition is that of the highest court of appeal, it will be necessary to keep the record out of the record room for a long period without any stamping being done

"Difficulty will arise if *(a)* the appellate court quashes the partition or decreases the value of the plaintiff's share, *(b)* or increases the value of the plaintiff s share In the one case the plaintiff will apparently be entitled to a refund of the stamp duty he has paid or to a refund of the proportionate share of that duty, and in the other case the decree of the appellate court should apparently be written on a stamp representing the balance between the amount of stamp duty actually paid and that which might have been levied had the original court passed the decree issued by the appellate court"

The officiating Government Advocate (Mr *W Wallach*) submitted that 'final order' in section 2 (15) and article 45 *(c)*, of the first schedule to the Indian Stamp Act was an order which finally defined the shares so far as the original court was concerned until it was set aside in appeal. "Final order" was distinguished from an 'Interlocutory order." It was the final order of the original court notwithstanding the fact that it might eventually be set aside or varied in appeal Section 2 (15) of the Stamp Act did not say "final decree" but "final order" Section 54 and order XX rule 18, of the Code of Civil Procedure referred to partition decrees, and the "preliminary decree" mentioned in section 54 of the Code was the "final order for effecting partition passed by any Civil Court' within the meaning of section 2 (15) of the Stamp Act It was the preliminary decree passed by any original civil court in a partition case or the order for effecting a partition passed by any original revenue court that required to be stamped If in appeal the separated share was increased, the order of the appellate court would be stamped with stamp payable on the amount of the increased share; if it was diminished the order of the court will be on un-stamped paper and a refund would be allowed of the amount payable on the value of the portion of the share cut off. The following cases were referred to —*Jotindra Mohan Tagore* v *Bejoy Chand Mahatap* (1), *Reference by Board of Revenue* (2) and *Balaram* v. *Ramkrishna* (3)

(1) (1904) I. L. R. 32 Calc. 483 (2) (1880) I. L. R., 2 All., 654
(3) (1905) I. L. R., 29 Bom., 366

KNOX, TUDBALL and PIGGOTT, JJ —After hearing the learned Government Advocate we agree with the Board of Revenue which has made this reference that the words 'final order' in section 2 clause (15) and article 45, clause *(c)* of schedule I of the Stamp Act No II of 1899, refer to the final order of the lowest court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed Let this be the answer to the reference made by the Board of Revenue

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STAMP REFERENCE BY THE BOARD OF REVENUE

APPELLATE CIVIL

Before Sir Henry Richards Knight, Chief Justice and Justice Sir Pramada Charan Banerji

1914 *January* 17.

CHETAN DAS (DEFENDANT) *v* GOBIND SARAN (PLAINTIFF) AND DAN KUNWAR AND OTHERS (DEFENDANTS)*

Act No IV of 1882 (Transfer of Property Act) section 84—Mortgage—Prior and puisne incumbrancers—Tender of amount of prior mortgage by puisne incumbrancer—Offer by letter.

Held that an offer by letter of the amount due on a mortgage is not a good tender within the meaning of section 84 of the Transfer of Property Act It is necessary that the money should be actually produced unless it can be shown that the person entitled to receive the money has waived this condition *Kamaya Naik* v *Devapa Rudra Naik* (1) referred to.

THIS was a suit on a bond executed in the year 1899 The principal defendant, Chetan Das, was a puisne mortgagee who held a mortgage of the year 1903 Shortly after the execution of this mortgage Chetan Das had deposited in court a sum of money to clear off the incumbrance of 1899, and in this suit he pleaded that payment in bar of the plaintiff's claim It was found, however, that the actual amount deposited, which the plaintiff had refused to accept was less than the sum due under the mortgage But the defendant further relied upon a letter in which he had offered to pay to the plaintiff a sum which was in fact in excess of what was due The court of first instance gave the plaintiff a decree, but not for the whole amount claimed The plaintiff appealed and the decree was modified in his favour by the lower

* Second Appeal No 86 of 1913 from a decree of W D Burkitt District Judge of Saharanpur dated the 3rd of February 1912 modifying a decree of Ladli Prasad, Additional Subordinate Judge of Saharanpur, dated the 24th of July 1911

(1) (1896) I. L R, 22 Bom, 440

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appellate court. The defendant Chetan Das then appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Sarat Chandra Chaudhri*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit on foot of a mortgage. The appellant was a subsequent mortgagee of the mortgaged property, and he alleges that he tendered more than the amount which was actualy due, and that, therefore, he should be relieved from the payment of interest subsequent to the alleged tender, and also the costs of the suit. Admittedly the appellant did not deposit sufficient, he only deposited the sum of Rs. 2,346-14-0. The amount found actually due was Rs. 2,513-7-9. The appellant, however, relies upon a letter which he wrote offering to pay Rs. 2,743-3-0. If this letter can be regarded as a good tender, the appellant is entitled to succeed. We are clearly of opinion that the offer by letter was not a good tender within the meaning of section 84 of the Transfer of Property Act. It is necessary that the money should have been actually produced, unless it could be shown that the person entitled to receive the money had waived this condition (*see* Wharton's Law Lexicon, 10th Ed., p. 747, and Fisher on Mortgages, 6th Ed., para 1506). The same view has been taken by the Bombay High Court in the case of *Kamaya Naik* v. *Devapa Rudra Naik* (1). It is thus clear that the letter cannot be regarded as a tender within the meaning of section 84 of the Transfer of Property Act. The appellant is, therefore, not entitled to claim relief from the interest after the date of the letter.

With regard to the costs in the suit something might be said if the appellant had taken steps to redeem the property immediately after he made the offer to pay it. He did not do so, and the plaintiff had to bring the present suit.

We accordingly dismiss the appeal with costs. We overrule the objections filed on behalf of the respondents. We extend the time for payment to six months from this date.

Appeal dismissed.

(1) (1896) I. L. R. 22 Bom., 440.

Before Mr. Justice Ryves and Mr. Justice Piggott

TOTA RAM (DEFENDANT) *v.* HARGOBIND AND ANOTHER (PLAINTIFFS) AND KISHORE SINGH AND OTHERS (DEFENDANTS).* 1913 *November, 4*

Mortgage—Purchase of mortgaged property by mortgagee in execution of his decree for sale—Subsequent suit for sale by a prior mortgagee—Plea of incompetence of mortgagor raised by mortgagee purchaser—Estoppel.

Held that a mortgagee who, in execution of a decree for sale in his favour, had purchased the mortgaged property himself, could not be permitted in another suit on a prior mortgage of the same property in which he was arrayed as defendant to set up the defence that the mortgagor was incompetent to execute the mortgage in suit. *Bishumbhar Dayal* v. *Parshadi Lal* (1), *Bakhshi Ram* v. *Liladhar* (2) and *Prayag Raj* v. *Sidhu Prasad Tewari* (3) referred to. *Radha Bai* v. *Kamod Singh* (4) distinguished.

THE facts of this case were as follows:—

One Kishore Singh made a mortgage of certain property in favour of one Tota Ram. The latter brought a suit on his mortgage, sold the property and purchased it in execution of the decree, which had been obtained against the mortgagor and his son. A prior mortgagee who had not been made a party to Tota Ram's suit, then brought this suit on his mortgage and Tota Ram defended the suit on the ground, among others, that Kishore Singh could not have made the mortgage, being at the time of the mortgage a member of a Hindu joint family consisting of himself, and his father, Kishore Singh was also made a defendant to the suit and he admitted the claim. The court of first instance dismissed the suit, but the lower appellate court reversed the decree holding that Tota Ram could not deny the validity of the mortgage now in suit being by reason of his mortgage and subsequent purchase a representative of Kishore Singh.

Tota Ram appealed to the High Court.

Mr. *Muhammad Raoof*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondents.

RYVES and PIGGOTT, JJ.:—The facts of this case are sufficiently stated in the judgement of the lower appellate court, and the point in issue before us is a very narrow one. We are now satisfied after

* Second Appeal No. 909 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 24th of April, 1912, reversing a decree of Muhammad Mubarak Husain, Subordinate Judge of Agra, dated the 14th of December, 1911.

(1) (1912) 10 A. L. J., 1112.
(2) (1913) I. L. R., 35 All., 353.
(3) (1908) I. L. R., 35 Calc., 877.
(4) (1907) I. L. R., 30 All., 38.

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examination of the documents produced in accordance with the order of this Court of the 14th of March, 1913, that the appellant Tota Ram took his mortgage from Kishore Singh and obtained his decree against Kishore Singh and his minor son, Bhagwan Singh It seems clear to us that Kishore Singh would not have been permitted to challenge the validity of his own mortgage, which as a matter of fact he has not attempted to do In our opinion Tota Ram cannot be allowed to do so either. We are content to refer as authorities on this point to *Bishumbhar Dayal* v *Parshadi Lal* (1), considered in connection with a very recent case, that of *Bakhshi Ram* v *Liladhar* (2) That Tota Ram is the representative in interest of Kishore Singh and cannot be permitted to challenge the mortgage, if Kishore Singh himself could not have done so, is apparent from this latter ruling as well as from the decision of the Calcutta High Court in *Prayag Raj* v *Sidhu Prasad Tewari* (3) This case is clearly distinguishable from such a case as *Radha Bai* v *Kamod Singh* (4), where the transfer was one expressly prohibited by law, and the contract entered into consequently against public policy was void under section 23 of the Indian Contract Act We accordingly dismiss this appeal with costs

Appeal dismissed.

(1) (1912) 10 A L J. 112

(2) (1913) I. L R. 35 All 353

(3) (1908) I. L. R 35 Cal. 877

(4) (1907) I L R 30 All 38

REVISIONAL CRIMINAL.

Before Mr Justice Ryves

EMPEROR *v* RAM LOCHAN AND OTHERS *

1913
December 6

Criminal Procedure Code sections 107 and 145—Procedure—Appointment of a chaudhri by traders using a certain market—Dispute as to chaudhri's dues between him and the servants of the zamindar

The traders who frequented a certain market in a village of the Azamgarh district which was owned by a lady residing in Benares agreed amongst themselves to appoint a certain person as *chaudhri* of the market and to pay him for his services by means of a small contribution for each beast of burden which brought goods to the market *The servants of the owner on the other hand,* wished to obtain these payments for themselves and it was found that they were ready to commit a breach of the peace in order to make good their alleged right thereto

Held that the circumstances were not such as would warrant the taking of action under section 145 of the Code of Criminal Procedure but that section 107 of the Code was the more appropriate section under which to proceed

THE facts of this case were as follows —

There was a market in the town of Kopaganj in the district of Azamgarh on land which belonged to Musammat Dhan Debi a lady residing in Benares The police reported to the Sub Divisional Magistrate that a breach of the peace was likely to take place between some of the servants of Musammat Dhan Debi and one Rameshwar, who had been appointed *chaudhri* of the market about the collection of certain dues The Magistrate instituted proceedings under section 107, examined the Inspector as a witness, and on that officer deposing that the servants of Musammat Dhan Debi claimed to collect these dues as part of the zamindari of their mistress came to the conclusion that the case 'could not appropriately be proceeded with under section 107 of the Criminal Procedure Code and that there was no alternative but to cancel the order passed under section 107 Criminal Procedure Code and to proceed under section 145 ' Fresh notices *in the terms of section 145 were drawn up, and* Ram Lochan Chandar Rai Rupa and Gopi (the servants of the lady) were served with notices as one party and Rameshwar was served with notice as the other party The learned Magistrate *intentionally,* he says omitted to make Musammat Dhan Debi a party to the

* Criminal Revision No 950 of 1913 from an order of Muhammad Shafi Khan, Magistrate, first class of Azamgarh dated the 3rd of July, 1913.

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proceeding, firstly, because she was a lady of respectable position and it "would be scandalous to make her figure as a party to a criminal proceeding" and secondly, because as she lived in Benares, it was very probable that she knew nothing whatever about what was going on in the market at Kopaganj. Having these two parties before him, the Magistrate took their evidence and found "that Rameshwar had been appointed by the banias and other dealers in Kopaganj to act as *chaudhri* and that these persons agreed to pay him at the rate of two pice per head of cattle brought to the market laden with articles for sale." The servants of Musammat Dhan Debi, he found, "were ambitious to stop him and enjoy the dues themselves." He went on to find that preparations had been made to cause a breach of the peace, and he accordingly came to the conclusion that Rameshwar was in possession of the disputed market dues, that is, two pice in the rupee, and his order ran:—"Rameshwar is in possession of the market dues as *chaudhri* and Ram Lochan, Chandar Rai Rupa and Gopi should not disturb his possession unless he is evicted therefrom in due course of law."

Against this order the servants applied to the High Court in revision.

Babu *Satya Chandra Mukerji*, for the applicants.

Babu *Sital Prasad Ghosh* for the opposite party.

The Assistant Government Advocate, (Mr. *R. Malcomson*) for the Crown.

RYVES, J.—This is an application in revision from an order purporting to have been passed under section 145 of the Code of Criminal Procedure by the Sub-Divisional Magistrate of Azamgarh, dated the 3rd of July, 1913. The facts of this case are somewhat peculiar, and, so far as I know, are not covered by any of the very numerous rulings which have been reported under the section. There is a market in the town of Kopaganj in the district of Azamgarh on land which belongs to Musammat Dhan Debi, a lady who resides in Benares. The police reported to the Sub-Divisional Magistrate that a breach of the peace was likely to take place between some of the servants of Musammat Dhan Debi and one Rameshwar, who had been appointed *chaudhri* of the market, about the collection of certain dues. The Magistrate

instituted proceedings under section 107 He examined the Inspector as a witness, and on that officer deposing that the servants of Musammat Dhan Debi claimed to collect these dues as part of the zamindari of their mistress, came to the conclusion that the case "could not appropriately be proceeded with under section 107 of the Criminal Procedure Code" and that "there was no alternative but to cancel the order passed under section 107, Criminal Procedure Code, and to proceed under section 145" Fresh notices in the terms of section 145 were drawn up, and Ram Lochan, Chandar Rai, Rupa and Gopi (the servants of the lady) were served with notices as one party and Rameshwar was served with notice as the other party. The learned Magistrate, intentionally, he says, omitted to make Musammat Dhan Debi a party to the proceeding, firstly because she was a lady of respectable position and "it would be scandalous to make her figure as a party to a criminal proceeding," and secondly "as she lives in Benares it is very probable that she knew nothing whatever about what was going on in the market at Kopaganj" Having these two parties before him, the Magistrate took their evidence and found "that Rameshwar had been appointed by the banias and other dealers in Kopaganj to act as *chaudhri* and that these persons agreed to pay him at the the rate of two pice per head of cattle brought to the market laden with articles for sale" The servants of Musammat Dhan Debi he found, "were ambitious to stop him and enjoy the dues themselves" He went on to find that preparations had been made to cause a breach of the peace and he accordingly came to the conclusion that Rameshwar was in possession of the disputed market dues, that is, two pice in the rupee and his order is "Rameshwar is in possession of the market dues as *chaudhri* and Ram Lochan Chandar Rai, Rupa and Gopi should not disturb his possession unless he is evicted therefrom in due course of law"

In revision before me it is urged that this order is bad for want of jurisdiction on three grounds Firstly, that the Magistrate having taken action under section 107 of the Code of Criminal Procedure had no jurisdiction subsequently to cancel that order and take proceeding under section 145 In my opinion this objection has no force, provided that the proceedings are

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otherwise justified under the section It is next objected that the subject matter in dispute was not one within the purview of the section, and thirdly that in any event the proper parties were not before the court The dispute in this case admittedly does not concern any tangible immovable property It can only come within the scope of the section if clause 2 of section 145 covers the case Land is said to include 'markets and "the rents or profits of any such property' I think it would be unduly stretching the definition to make it cover this case There is no dispute in this case to the land or to the market Both admittedly belong to Musammat Dhan Debi What her rents and other rightful profits from this market may be is also not in dispute According to the finding of the Magistrate the *banias* and other persons who come to the market to sell their goods there appointed Rameshwar *chaudhri* of the market, an office which imposed on him certain duties such as regulating the business of the market and so forth They agreed to remunerate him for his services by allowing him to collect two pice per head of cattle brought into the market laden with articles for sale This payment to Rameshwar apparently was purely voluntary on their part and was in no way connected with the ordinary rents and profits of the market and was not a perquisite of the zamindar, but was a personal matter between the *banias* and the *chaudhri* Instead, however, of paying him a fixed sum out of their pockets, they allowed him to collect his remuneration as stated The servants of Musammat Dhan Debi who were employed by her to collect her legitimate rents and profits sought to deprive Rameshwar of this source of his income, and as the court finds, wished to enjoy it themselves and apparently without any justification It seems to me therefore, that the dispute in this case did not relate to the 'profits' of a market, within the meaning of the section As to the third objection, it seems to me that if there was truth in the statement of these servants of Musammat Dhan Debi that they were acting in the interests and for the benefit of Musammat Dhan Debi, then she must be deemed 'a party concerned in the dispute" and as such was a necessary party to these proceedings If she had been made a party, she would either have supported the action of her servants, and in that case, she certainly had a right to be heard

and in fact was a necessary party If, on the other hand, she had repudiated the action of her servants as being beyond the scope of their authority (as indeed their action was as found by the court) then in all probability she could have put a stop to their illegal behaviour for the future and no orders of the court would have been necessary

As it is the order of the court secures no permanent result It is a personal order binding four individual servants of the lady. If she is really desirous of obtaining the dues now paid to Rameshwar, all she has to do is to replace these individuals by others who will not be bound by the order and the whole trouble will begin again

If, on the other hand, the finding had been against Rameshwar, all that he need have done, was to get a substitute appointed in his stead and so proceedings might go on *ad infinitum*

In my opinion section 145 was not intended to meet a case precisely like this one, and on the second ground taken, I set aside the order as being one without jurisdiction under that section

In my opinion section 107, Criminal Procedure Code, was the appropriate section, and it will be open to the court to take proceedings under that section, if it is of opinion that such action is called for.

Order set aside

Before Mr. Justice Tudball and Mr Justice Piggott.

1913 *December*, 13

EMPEROR v. KHARGA*

Criminal Procedure Code sections 110 and 437—Security for good behaviour—"Release" or "discharge"—Competence of District Magistrate to order further inquiry under section 437 against a person in whose favour an order under section 119 has been passed

Held that a person who has been "released" or "discharged" under section 119 of the Code of Criminal Procedure is so far in the position of "an accused person who has been discharged" within the meaning of section 437 of the Code that it is competent to the District Magistrate to take further action against such a person under the last named section

Where however, proceedings had twice been taken under section 110 without result and the District Magistrate had not given the person concerned any opportunity of showing cause against the order which might be passed, his

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* Criminal Revision No. 867 of 1913 from an order of H. G. S. Tyler, District Magistrate of Cawnpore, dated the 14th of August, 1913.

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proceedings were set as de *Queen Empress* v *Ahmad Khan* (1) *Sheo Din* v *King Emperor* (2) *Muhammad Khan* v *King Emperor* (3) *Velu Taji Ammal* v *Chidambaravelu Pillai* (4) *Queen Empress* v *Imam Mondal* (5) *Dayanath Taluqdar* v *Emperor* (6) *Hopcroft* v *Emperor* (7) *King Emperor* v *Fyaz ud din* (8) *Queen Empress* v *Mutasaddi Lal* (9) and *Queen Empress* v *Ralli* (10) referred to.

THE facts of this case were as follows —

One Kharga was called upon to show cause why he should not furnish security for good behaviour The Magistrate before whom the proceedings took place came to the conclusion, after hearing the evidence produced by the police that no case had been made out for taking security from Kharga He ordered Kharga to be released under section 119 of the Code of Criminal Procedure The District Magistrate, on examining the record, made an order under section 437 of the Code of Criminal Procedure directing further inquiry into the case, and the case went before another Magistrate The latter drew up fresh proceedings under section 112 of the Code of Criminal Procedure and made a fresh inquiry On the evidence produced he was of opinion that no necessity for requiring security for good behaviour was established against Kharga and released him Thereupon the District Magistrate again examined the record and again directed further inquiry under section 437 Against this order Kharga applied in revision to the High Court

Babu *Sital Prasad Ghosh*, for the applicant —

The first question for determination is whether the District Magistrate had authority to order further inquiry under section 437, Criminal Procedure Code in this case, in other words, whether proceedings terminating with an order under section 119 of the Code of Criminal Procedure can be deemed to be a ' case of any accused person who has been discharged within the meaning of section 437 I need not in this case raise the contention whether a person who is proceeded against under Chapter VIII B of the Criminal Procedure Code is or is not an ' accused person ' , it has been ruled by this Court that he is The question is what is the

(1) Weekly Notes 1900 p 206
(2) (1903) 6 Oudh Cases 262
(3) (1905) Punj Rec., Cr J., p 102
(4) (1909) I L. R., 33 Mad., 85
(5) (1900) I. L. R., 27 Cal , 662
(6) (1905) I L R, 33 Calc., 8
(7) (1908) I L. R. 36 Calc., 163
(8) (1901) I L R. 24 All 148
(9) (1898) I. L. R., 21 All, 107
(10) Weekly Notes, 1890, p 203

meaning of the word "discharged" in section 437. I submit it means "discharged from an offence charged" against the accused person The case of a person discharged under section 119 cannot come within this meaning for he has never been charged with the commission of any offence "Discharged" in section 437 must be deemed equivalent to "discharged within the meaning of sections 209, 253 and 259, Criminal Procedure Code" Section 437 has therefore, no application to an order of "discharge" passed under section 119, *Velu Tayi Ammal* v *Chidambaravelu Pillai* (1) *Queen Empress* v *Imam Mondal* (2), *Queen Empress* v *Ahmad Khan* (3), *Muhammad Khan* v *King Emperor*, (4) *Sheo Din* v *King Emperor* (5), *Dayanath Taluqdar* v *Emperor* (6)

Apart from this, the present case clearly does not come within the scope of section 437 Here the man has not been "discharged" at all, he has been "released" under section 119 Both the words "released" and "discharged" occur in that section, they are used in contra distinction with each other The applicant was in custody during the inquiry under Chapter VIII, and so the order under section 119 passed in his case was an order of "release" The Legislature having intentionally made a distinction between the two terms it cannot be said that a person "released" under section 119 is a person who has been "discharged," and so section 437 cannot apply to his case

The next question is whether, assuming section 437 applies, the order directing further inquiry is a proper order in the circumstances of the case The applicant was twice subjected to an inquiry under Chapter VIII and two different magistrates came to the conclusion that no case had been made out for demanding security from him. Under these circumstances the order directing further inquiry is uncalled for

Assistant Government Advocate (Mr *R Malcomson*) for the Crown

Section 437 of the Code of Criminal Procedure applies to the case of a person released or discharged under section 119 A person who is proceeded against under Chapter VIII is an "accused

(1) (1900) I L R, 33 Mad 85
(2) (1900) I L R 27 Calc, 662
(3) Weekly Notes 1900 p 205
(4) (1905) Punj Rec Cr J, p 102
(5) (1903) 6 Oudh Cases, 262
(6) (1905) I L R, 33 Calc, 8

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person" *Queen-Empress* v. *Mutasaddi Lal* (1) and *Hopcroft* v. *Emperor* (2).

Under the Criminal Procedure Code the only modes by which an accused person is let off are acquittal and discharge. The order releasing the applicant under section 119 is certainly not an acquittal, it is a discharge. The case, therefore, comes within the clause "case of an accused person who has been discharged" of section 437. The word "discharged" has, no doubt, been used in the Criminal Procedure Code with different meanings at different places; for example ' discharging a witness", "discharging a bail-bond," "discharging a jury" as well as "discharging an accused person" But confining the term to an accused person, it cannot be said that it has one meaning in section 119 and a different meaning in the other parts of the Code. I rely on the following cases: *Queen-Empress* v. *Ratti* (3), *King-Emperor* v. *Fyaz ud-din* (4), *Queen Empress* v. *Mutasaddi Lal* (1).

Then, although both the words "release" and "discharge" are used in section 119, it does not follow that there is such a distinction between them—that the case of a person released under that section does not come within the scope of the words "case of an accused person who has been discharged" in section 437. The distinction is based merely on the circumstance whether the person is in custody or on bail; in the former case he is "released" or allowed to depart, and in the latter case he is "discharged," that is to say, the bail-bond is cancelled. The case in 19 A. W. N., 203, already cited, is direct authority for the proposition that the word "released" in section 119 is not used in contra distinction to "discharged" in section 437, and that a person "released" under section 119 comes within the scope of section 437.* Of the cases cited by the applicant, the case in 20 A. W. N., 206, merely follows the case in 27 Calc., 662; it does not give any reasons. In the case in 6 O. C., 262, the District Magistrate did not profess to act under section 437; the case is beside the point and goes too far. In the case in 33 Calc., 8, the scope of section 437 was not considered; there the District Magistrate had on appeal ordered further inquiry and directed security to be taken for a large amount and

(1) (1899) I. L. R., 21 All., 107.
(2) (1903) I. L. R., 35 Calc., 163.
(3) Weekly Notes, 1899, p. 203.
(4) (1901) I. L. R., 24 All., 148.

for a long period and it was held that he had no power to order the further inquiry in the terms in which he did so On the merits of the case, no doubt the applicant had been twice discharged, but if the District Magistrate, who is responsible for keeping the peace and maintaining good behaviour, in his district is of opinion after inspecting the record that it is necessary to bind the applicant over to be of good behaviour, his discretion should not be lightly interfered with

Babu *Sital Prasad Ghosh*, in reply —The case in 21 All, 107, does not discuss the meaning of the word " discharged " in section 437 In the case in 24 All, 148, the District Magistrate had not acted under section 437 at all, and Knox J, distinguished that case from the case in 20 A. W N, 206, on this ground

TUDBALL and PIGGOTT, JJ —This is an application in revision against an order of the District Magistrate of Cawnpore, purporting to have been passed under section 437 of the Code of Criminal Procedure in regard to proceedings taken against the applicant under section 110 of the Code The facts of the case are simple Proceedings were instituted against Kharga and he was called upon to show cause why he should not give security for his good behaviour The Magistrate before whom he appeared inquired into the matter and after recording the evidence, discharged him The District Magistrate examined the record and directed further inquiry This was made by another Magistrate, who after recording evidence held that there was no necessity to bind over the man to be of good behaviour The District Magistrate without issuing any notice to Kharga has again sent for the record and has again directed further inquiry

We note here that at the second of the two above inquiries the Magistrate drew up a fresh formal order under section 112 of the Code

Two grounds are taken before us

(1) " That section 437 of the Code does not apply to proceedings under this Chapter (VIII) at all and the Magistrate had no power to direct a further inquiry as he has done

(2) " That even assuming that the order passed is within the District Magistrate s powers still the applicant having undergone the ordeal of two inquiries and having been discharged by two

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different magistrates, ought not to be subjected to any further proceedings, at least for the present"

Strictly speaking by reason of the view which we take of the merits it is unnecessary for us to decide the first point for the purposes of this case, but as it has been raised in another case (*King Emperor* v *Sheobher and Jageshar*) which has been heard in conjunction with the present one we deem it fit to consider and decide it

Section 437, Criminal Procedure Code, authorizes a District Magistrate to make or direct the making of further inquiry into *(a)* any complaint which has been dismissed under section 203 or sub section (3) of section 204, or *(b)* the case of any *accused* person who has been *discharged*

It is clear that the action taken by the District Magistrate, if taken under this section, could only fall under the latter of the two above-mentioned sets of circumstances, i e, the case of any accused person who has been discharged In view of the rulings of this Court it is conceded for the applicant that he is an 'accused person within the meaning of this section but it is pleaded that he is not a person who has been 'discharged' within its meaning, inasmuch as the word discharged here means 'discharged from an offence charged against him' and in proceedings under Chapter VIII the accused is not charged with any offence and if the Magistrate does not deem it necessary to make his order absolute he either releases the accused, if in custody, or discharges him i e allows him to leave the court, only if he is on bail In support of this plea the attention of the Court has been called to the following rulings —*Queen Empress* v *Ahmad Khan* (1) *Sheo Din* v *King Emperor* (2), *Muhammad Khan* v *King Emperor* (3) *Velu Tayi Ammal* v *Chidambaravelu Pillai* (4) *Queen Empress* v *Imam Mondal* (5) *Dayanath Taluqdar* v *Emperor* (6) and *Hopcroft* v *Emperor* (7)

On the other hand it cannot be overlooked that there are the following rulings of our own Court which are against the applicant's contention —*King Emperor* v *Fyaz ud din* (8)

(1) (1900) Weekly Notes, 1900 p 200
(2) (1903) 6 Oudh Cases 562
(3) (1905) Punj Rec., Cr J., p 102
(4) (1909) I L R, 33 Mad., 85
(5) (1900) I L R., 27 Calc 662
(6) (1905) I L R., 33 Calc., 8
(7) (1909) I L R 36 Calc 103
(8) (1901) I L R 24 All., 149

Queen Empress v *Mutasaddi Lal* (1) and *Queen-Empress* v *Ratti* (2)

It is urged also that the section would not apply to the case of a person who had been "released" under section 119, who clearly is not, in view of the language of the section, a person "discharged"

The question is what meaning the Legislature intended to give to the word *discharged'* in section 437 If the matter were *res integra* we should be inclined to hold that section 437 was never intended to apply at all to proceedings under Chapter VIII chiefly for the reason, as pointed out in *Muhammad Khan* v *King Emperor* (3) and *Dayanath Taluqdar* v *Emperor* (4), that there is apparently no reason so far as the provisions of the Code go why the District Magistrate should not at any moment institute fresh proceedings under the Chapter for good and sufficient reasons against a person in whose case an order of release or discharge has been passed under section 119 We are aware of the ruling in the Oudh case mentioned above where it was laid down in the judgement that such fresh proceedings should not be instituted at least for 'some months, but neither the Code nor good reasoning lays down any period All that is necessary in our opinion for such action is 'good and sufficient reason" It is not inconceivable that a wrong order of release or discharge may be passed in the case of a man who is a real and serious danger to society and in whose case it may be imperatively necessary for the public welfare to take fresh steps and in taking these fresh steps we can see no reason why the District Magistrate should not examine the record of the former proceeding

But, as we have pointed out the trend of the decisions in this Court is clearly to the effect that the language of section 437 is wide enough to cover the case of a person in whose case an order of release or discharge (both of which are really to the same effect) has been passed under section 119 The only decision to the contrary is that of Aikman J in *Queen Empress* v *Ahmad Khan* (5) and his decision was based merely on the Calcutta ruling mentioned therein without giving any other reason.

(1) (1898) I L R. 21 All 107 (3) (1905) Panj R c, Cr J p 102
(2) Weekly Notes 1899 p 203 (4) (1905) I L R. 33 Calc, 8
(5) Weekly Notes 1900 p 203

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agreed upon, and I think the ruling in *Sheo Nandan Rai* v. *Thakur Rai* (1) is sufficient authority for this proposition. I dismiss the appeal under Rule II."

From this judgement the defendants appealed under section 10 of the Letters Patent.

Munshi *Haribans Sahai*, for the appellants, submitted that the zamindar could not claim rent at a higher rate than was payable under section 10 of the Agra Tenancy Act. The word used in the section was "shall" and the provisions were imperative. An agreement to the contrary was not binding.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Gulzari Lal*), for the respondents, submitted that section 10 gave an exproprietary tenant the privilege of paying rent at the rate mentioned therein, but there was no bar to his binding himself to pay more. If he entered into an agreement with respect to the payment of rent at a particular rate that agreement was enforcible against him. The words used in the section were not that "he shall hold the land at a rent &c." but that "he shall be entitled to hold the land at a rent &c." That showed that a right was given to the tenant, but there was no bar to his waiving it. The Legislature had not taken away the freedom of contract as to the rate of rent. *Sheo Nandan Rai* v. *Thakur Rai* (1). If the Legislature intended to lay down a different rule, then it had not been able to express its intention in exact language. In the same clause of section 10 the Legislature had used two phrases, namely, "shall become" and "shall be entitled to" with some purpose.

Munshi *Haribans Sahai* was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts out of which this appeal arises are admitted. The suit was one for rent. The holding at one time was the *sir* of the defendants, who were then proprietors. They mortgaged their proprietary rights, and on the same day agreed to pay a rent to the plaintiffs of Rs. 8 per bigha. It is admitted that the rate which an exproprietary tenant, within the meaning of the Tenancy Act, would pay for an exproprietary holding would be Rs. 3-11 odd. Accordingly the rent claimed in the present suit is largely in excess of the rent to which the defendants were entitled as expropriety tenants to hold the land. The court of first instance dismissed the suit of the plaintiffs on

(1) (1909) 6 A. L. J., 161.

the ground that the agreement to pay an excess rent was contrary to law The lower appellate court reversed this finding and decreed the suit A learned Judge of this Court dismissed the appeal affirming the decree of the lower appellate court Hence the present appeal

Section 10 of the Tenancy Act provides that where a proprietor alienates his proprietary rights he shall become a tenant with a right of occupancy in his *sir* land *It goes on further to provide* that he shall be *entitled to hold* the same at a rent which shall be four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality

It is argued on behalf of the plaintiffs that while an exproprietary tenant is '*entitled to hold*' his land at that rate, there is nothing in law to prevent him entering into a contract to pay a higher rent The appellant contends on the other hand that by alienation a proprietor becomes an exproprietary tenant with all the rights of such and that he cannot contract himself out of such right

In our opinion the contention put forward on behalf of the appellant is correct This Court has always held that a proprietor cannot contract himself out of his right to become a tenant of his *sir*, and in our opinion he cannot contract himself out of his right to become an exproprietary tenant with all the rights of such. We need hardly point out that to hold otherwise would be contrary to the clear policy of the Act and would in fact make the provisions of section 10 entirely nugatory

We accordingly allow the appeal, set aside the decree of this Court and also of the lower appellate court and restore the decree of the court of first instance with costs in all courts

Appeal allowed.

1914
January 17

Before Sir Henry Richards, Knight Chief Justice and Justice Sir Pramada Charan Banerji

RAM CHARAN AND ANOTHER (PLAINTIFFS) *v* MIHIN LAL AND ANOTHER (DEFENDANTS) *

Joint Hindu family—Sale of family property by managing member for the benefit of the family—Sale binding on minor members of the family

The managing member of a joint Hindu family sold certain joint family property for the purpose of providing funds for the marriage of one of the female members of the family and partly of carrying on a shop in which the family was interested *Held* that the sale was valid and binding on the minor members of the family although the vendor was not in the circumstances of the case their natural guardian *Hunoomanpersaud Panday* v *Mussumat Babooee Munraj Koonweree* (1) and *Mohanund Mondul* v *Nafur Mondul* (2) referred to

THIS was a suit for a declaration that a sale-deed executed by Gopal Das, brother of the plaintiffs, was null and void as against them on the ground that the property sold belonged to the joint family of which the plaintiffs, their father Hoti Lal, their brother Gopal Das and their grandfather Parbhu Lal, were members, and that Gopal Das alone had no authority to sell without the concurrence of the plaintiffs Gopal Das purported to have executed the sale deed as guardian of his minor brothers, the plaintiffs and as head of the joint family of which he and his brothers were members It appeared that he was not the natural guardian of the minor brothers, as the mother of the plaintiffs was alive at the time of the sale It also appeared that Hoti Lal himself had purchased the property and Parbhu Lal was not in possession of it nor did he share in the profit arising from it The lower court held that Gopal Das was manager of the family and that he sold the property in order to raise money to meet the expenses of the marriage of his sister and to carry on a family business The suit of the plaintiffs was therefore dismissed The plaintiffs appealed to the High Court

Munshi *Haribans Sahai* (with him The Hon'ble Dr *Tej Bahadur Sapru*) for the appellants, argued that Parbhu Lal and his son and grandsons were members of a joint Hindu family and consequently in the life time of Parbhu Lal nobody else could be treated as *karta* of the family In any case the mother of the

* First Appeal No. 175 of 1912 from a decree of Muhammad Shams-ud-din Officiating First Additional Subordinate Judge of Aligarh dated the 27th of April 1912

(1) (1856) 6 Moo I A, 393 (412) (2) (1899) I L R, 26 Cal, 820

minors being alive, she was their natural guardian, and the elder brother, Gopal Das, was not in law the guardian of his minor brothers and could not act as such. He cited Trevelyan on Hindu Law, p 209

Dr *Satish Chandra Banerji* (with him The Hon ble Pandit *Moti Lal Nehru*), for the respondents, submitted that the Hindu Law did not prescribe any hard and fast rules regarding guardianship The property in dispute being the self acquisition of Hoti Lal, his father Parbhu Lal had nothing to do with it The mother may be *de jure* the natural guardian, but as she is a female the adult brother may *de facto* act as such, and if he does act as guardian of his brothers and enters into some transaction which is for the benefit of those brothers, they would be bound by his acts The property was joint ancestral property in the hands of the three brothers and the elder brother must be treated as the *karta* of this parcel of property He cited Trevelyan on Minors, pp 49 51, *Thakoor Moti Singh* v *Dowlut Singh* (1), *Gunga Pershad* v *Phool Singh* (2), *Hunoomanpersaud Panday* v *Mussumat Babooee Munraj Koonweree* (3) and *Gharib ullah* v *Khalak Singh* (4)

[BANERJI J referred to *Mohanund Mondul* v. *Nafur Mondul* (5)]

Munshi *Haribans Sahai*, in reply referred to Ghose s Hindu Law, p 713, *Tirbeni Pershad* v *Ram Narain* (6) and *Jamna Prasad* v *Jagdeo* (7)

RICHARDS, C. J , and BANERJI, J —The suit which has given rise to this appeal was brought by the plaintiffs appellants for a declaration that a sale-deed executed by their brother Gopal Das in favour of the first defendant, Mihin Lal, on the 4th of January, 1910, was null and void and not binding on them They allege that the property comprised in the sale belongs to the joint family, of which they, Gopal Das, their father Hoti Lal, and their grand father Parbhu Lal, were members, and that Gopal Das had no authority to sell it without the concurrence of the plaintiffs They

(1) (1844) N W P, S D A, 1844, p. 36
(2) (1868) 10 W R C R 106
(3) (1856) 6 Moo I A, 393 412—4
(4) (1903) I L R, 25 All, 407
(5) (1899) I L R, 26 Calc., 820
(6) (1913) 11 A L J 713
(7) Weekly Notes 1908 p 163

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further allege that the first defendant induced Gopal Das to make the sale by practising a fraud upon him and did not pay the amount which purported to be the consideration for the sale

The court below has found against the plaintiffs It was of opinion that Gopal Das was the manager of the family and that he sold the property in order to raise money to meet the expenses of the marriage of the sister of himself and the plaintiffs and to carry on a shop which jointly belonged to him and the plaintiffs That court dismissed the suit

It is contended on behalf of the plaintiffs that Gopal Das was not their legal guardian and was not competent to sell the property on their behalf Gopal Das purports to have executed the sale deed of the 4th of January, 1910, as guardian of his minor brothers and also as manager and head of the joint family of which he and his brothers were members It is true that Gopal Das was not the legal guardian of the plaintiffs, but if he was the manager of the joint property which belonged to him and his brothers and the transaction was for the benefit of the plaintiffs, it is binding on them The law on the subject is thus stated in Mayne's Hindu Law, VII edition, p 225 :—"Where the act is done by a person who is not his guardian but who is the manager of the estate in which he has an interest, he will equally be bound, if under the circumstances the step taken was necessary, proper or prudent" This is in accordance with the ruling of their Lordships of the Privy Council in the well known case of *Hanoomanpersaud Panday* v *Munraj Koonweree* (1) That no doubt was a case of a mortgage, but the principle equally applies to the case of a sale: [illegible]

[illegible] Subordinate Judge has come to the conclusion that the consideration for the sale which far exceeded the amount for which the property had been purchased, was actually received and applied partly towards the expenses of the marriage of the sister and partly in carrying on this shop We see no reason to differ from this conclusion, but are on the contrary satisfied that the evidence supports it In this view, Gopal Das being the manager of the property and the sale being to the advantage of the plaintiffs also, it is binding on them.

(1) (1856) 6 Moo, I A, 393 (412) (2) (1899) I L R, 26 Calc, 620

An argument was addressed to us to the effect that the property must be deemed to have been the joint property of Parbhu Lal and Hoti Lal The lower court has found that it has not been proved that Parbhu Lal was interested in the property We are not prepared to dissent from that conclusion But even if it was joint property in which Parbhu Lal had an interest, since the sale was for valid purposes, it would attach to the interests of Parbhu Lal which came to Gopal Das and his brothers by right of survivorship

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We accordingly dismiss the appeal with costs

Appeal dismissed

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Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji

BALDEO DAS (DEFENDANT) v GOBIND DAS (PLAINTIFF) *

Act No I of 1872 (Indian Evidence Act), section 35—Evidence—Public document—Report made by kotwal in 1840, on reference by the Political Agent

Held that, on the question of the ownership of a certain temple said to be the property of the Ajaigarh state the report of a kotwal who in 1840 had made an inquiry into the ownership of the temple at the instance of the Political Agent was relevant evidence as being a public record of a public inquiry

THE facts of this case were as follows —

The plaintiff alleged that the Ajaigarh State owned a temple of Sri Thakurji Shiam Sundar, and that the whole of the village Sangrampur, which is a revenue free village, in the district of Banda was dedicated to this temple The State was competent to appoint the *mahant*, and the last *mahant*, Bihari Das was also appointed by the State He died in 1890, and the *mahantship* remained vacant up to the 15th of March, 1910, when the plaintiff was appointed to fill up the vacancy The plaintiff on these facts asked for possession of the village dedicated to the temple, of which according to him the defendant had wrongfully taken possession The defendant defended the suit on the ground that the temple did not belong to the Ajaigarh State which had no power to appoint the *mahant*, that the *gaddi* was meant for a *bairagi* of the *Charan Dasi* sect whereas the plaintiff was a *Harabhyasi* and was not a fit person to be appointed, and that the defendant was according to the custom duly elected a

* First Appeal No 255 of 1912 from a decree of Achal Bihari, Subordinate Judge of Banda dated the 13th of May, 1912

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mahant by the *mahants* of the adjoining places, who had power to elect him To prove the right of the State to the temple the plaintiff filed in evidence the report of the *kotwal* of Banda dated 1840 who had been ordered to make an inquiry about the ownership and possession of the temple in dispute, and who had come to the conclusion that the temple was built by the Rani of Raja Guman Singh, and that it was the property of the State The Subordinate Judge admitted this document in evidence and, deciding the facts in favour of the plaintiff decreed the suit The defendant appealed to the High Court

The Hon ble Dr *Sundar Lal* (with him Babu *Mangal Prasad Bhargava*) for the appellant —

The plaintiff had to prove his title If the temple was the property of the *Raj* no doubt the Raja would be entitled to appoint the *mahant* but the evidence was not sufficient to prove the ownership of the *Raj* The copy of the *kotwal s* report was not admissible in evidence His conclusions were based on hear say evidence The plaintiff was a *Harabhyasi* and could not be appointed to the *gaddi* which was a *Charan Dasi gaddi* and had been held by *Charan Dasis* for over a hundred years He referred to the evidence in detail

The Hon ble Dr *Tej Bahadur Sapru* (with him Babu *Pursotam Das Tandan* and Pandit *Krishna Rao Laghate*) for the respondents —

The temple was not meant for any particular class of Hindus It was built by the *Raj* and was the property of the Raja The Raja was competent to appoint a *mahant* and he had always done so He referred to oral and documentary evidence among which was the report of the *kotwal* mentioned above Both the plaintiff and the defendant were *Vaishnavites* and it was immaterial whether the *mahant* was a *Charan Das* or a *Harabhyasi*, *Gerda Puri* v *Chatar Puri* (1) and *Chandranath Chakrabarti* v *Jadabendra Chakrabarti* (2) The fact that for a hundred years it was held by *Charan Dasis* was immaterial, *Sheo Prasad* v *Aya Ram* (3), *Gossami Sri Gridharji* v *Romanlalji Gossami* (4) The founder has a right to appoint the

(1) (1886) I L R 9 All 1
(2) (1906) I L R 28 All. 689
(3) (1907) I L R 29 All 663
(4) (1889) I L R 17 Calc 3

mahant The Raja being the founder is competent to appoint and the plaintiff has thus a right to sue He referred to the evidence in detail and also referred to *Imperial Gazetteer of India*, Vol V—Account of the Ajaigarh State

The Hon'ble Dr *Sundar Lal* replied

RICHARDS C J, and BANERJI J —This appeal arises out of a suit in which the plaintiff claimed possession of a village called Sangrampur The plaintiff says this village appertained to a temple in mauza Nimmipar in the Ajaigarh State, that the power to appoint a *mahant* of that temple is vested in the Raja of Ajaigarh, and that the Raja duly appointed him *mahant* The appellant pleads that the village in question does not appertain in any way to the temple at Nimmipar, that the Raja has no power to appoint, that he himself was appointed many years ago, upon the death of the last *mahant* to the *gaddi* which is situate not at Nimmipar but at Sangrampur the village itself It was also pleaded that the plaintiff belongs to the *Harabhyasi* sect, while the *gaddi* is *Charan Dasi* and that accordingly the plaintiff can in no event be appointed to be *mahant* of this temple

The court below has come to the conclusion that the village appertains to the temple, which is situate in mauza Nimmipar in the Ajaigarh State, and that the Raja has the power to appoint, and that he duly appointed the plaintiff, and accordingly has decreed the plaintiff's suit with mesne profits to be determined in execution of the decree

The defendant appeals We have carefully considered the evidence and heard both sides, and we are quite satisfied that the village in question appertains to the temple, which is situated at Nimmipar in the Ajaigarh State The earliest document is a document of 1801 in which Nawab Ali Bahadur and Raja Himmat Bahadur granted this village to one Mahant Bhajnanand It is stated that the village 'should be released to be enjoyed by the *naib* of the said *mahant* and on no account should any interference be made with the income therefrom, which should be spent by the said *mahant* on his own maintenance with perfect peace of mind The said *mahant* should devote himself to bathing and meditation at the banks of the Ganges and remain engaged in offering prayers for the prosperity of the *sarkar*" The

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defendant contends that the document clearly shows that the grant was made to Mahant Bhajnanand personally It will be seen that this was not the original grant It appears that the two villages named Sunrahai and Rewai had been formerly granted and that this document of 1801 was merely the substitution of the village of Sangrampur for the two villages mentioned above Apart from this document all the evidence is in favour of the village being granted as an endowment for the maintenance of the temple It is common case that as far as the history of the village goes back it has always been used for this purpose as a matter of fact There can be little doubt that Bhajnanand was the *mahant* of this temple Undoubtedly Mahant Ram Sanehi was *mahant* of the temple after him Jugal Das who succeeded him was also the *mahant* Bihari Das who succeeded Jugal Das, was the next *mahant* All these persons were in enjoyment of the profits of this village and all of them admitted that the income of the village went to meet the expenses of the temple At one time the village which was *muafi* was resumed by Government but, on the representation that it had been granted as an endowment for the temple of mauza Nimnipar the British Government remitted the revenue and the village was again *muafi* and it remains so to the present time Under these circumstances we agree in the finding of the court below that the village in question did appertain to the temple in mauza Nimnipar

The next question is whether the Raja of Ajaigarh had authority and was the proper person to appoint the *mahant* of the temple It is admitted that the temple is within his territory We find that a report made by the *kotwal* as far back as the year 1840, recited that the temple was built by the wife of Raja Guman Singh who was the Raja of Ajaigarh, and that Bhajnanand had been the first *mahant* and that he was succeeded by Ram Sanehi who was appointed by the Raja's successor It is said that this document is not evidence We think that it is evidence It is a public record of a public inquiry The matter was referred to the *kotwal* for a report by the Political Agent in connection with the appointment of Jugal Das as *mahant* of the temple by the Raja of Ajaigarh We find later on that the Raja purported to depose Jugal Das for misconduct and to appoint

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Bihari Das as his successor The authorities in British India appear to have questioned the authority of the Raja to make the appointment and to have put one Mohan Das a claimant, into possession. After inquiry the representatives of Government recognized the authority of the Raja to make the appointment Later on the Raja thought fit to depose Bihari Das in turn and to re-appoint Jugal Das Again the authority of the *raj* was recognized. Later on Jugal Das was once more deposed and Bihari Das re appointed The authority of the Raja was again recognized. There is no evidence worthy of the name on the record to show that any other person or authority ever appointed a *mahant* of this temple other than the Raja of Ajaigarh for the time being The fact that the Raja did make the appointment of *mahant* rather goes to support the finding of the *kotual* in 1840 that the founder of the temple was the Raja, or the wife of the Raja, of Ajaigarh, and if this is so in the absence of any other provision as to the endowment, the power to appoint a *mahant* would rest in the founder and his successors

On the whole we see no reason to differ from the court below in the finding that the Raja had power to appoint a *mahant*

With regard to the plea raised by the defendant that the plaintiff was not qualified for appointment by reason of the fact that he belonged to the sect known as *Harabhyasi* it is true that apparently all the previous *mahants* belonged to the *Charan Dasi* sect, but the defendant did not show in the court below that the plaintiff by reason of his not belonging to that sect was incapable of performing the duties of a *mahant* of this particular temple, and we know of no reason why he should be so disqualified The defendant s case in the court below was that the village had no connection with the temple at Nimnipar and that the Raja had no power or authority whatsoever We think, however, that it may not be out of place to make some comment on the past appointments At one time Jugal Das was appointed He was removed from the *mahantship* on grounds of immorality and Bihari Das was appointed in his place Very shortly afterwards Bihari Das was removed from his office on the very same grounds and the same Jugal Das was re-appointed as a moral and honest man. Very shortly after that Jugal Das is said again to have

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become immoral and Bihari Das moral, and the latter was once more appointed to the office which he held up to the time of his death These appointments and re appointments were not calculated to bring credit on the Darbar, but they are comparatively speaking ancient history But even the recent appointments cannot be regarded as satisfactory Bihari Das died in the year 1899 The defendant who appears to have had the approval of the other *mahants* and who would have been not an unnatural successor to Bihari Das has remained *de facto mahant* up to the date of the institution of the suit It is true that he was called upon in the year 1900 to appear before the Darbar and make good his claim and that apparently he did not do so Nevertheless he was allowed to remain in possession until the present suit was instituted on the 5th of December, 1911 We feel sure that in future when the vacancy occurs in this *mahantship* the Darbar will take care to appoint a fit and proper person to exercise the functions of *mahant* as soon as such an appointment can reasonably be made and so avoid disputes and s andal

We think that the decree of the court below ought to be varied in one particular That court has awarded mesne profits to be ascertained in exe ution We think considering that the defendant was allowed to remain in possession in the way we have mentioned, there ought to be no profits save from the date of this judgement We are informed by both parties that possession has already been given This being so, the decree of the court below will be varied by dismissing the claim for mesne profits We affirm the remainder of the decree The appellant must pay the costs of this appeal

Decree modified

REVISIONAL CRIMINAL

1913 December 22

Before Justice Sir George Knox and Mr Justice Tudball

BASHIR HUSAIN v ALI HUSAIN AND OTHERS *

Criminal Procedure Code section 192—Transfer—Case transferred by District Magistrate to the Court of a Sub-Divisional Magistrate—Further transfer by Sub Divisional Magistrate ultra vires

Held that when a District Magistrate has referred a case for trial to a Sub Divisional Magistrate the latter has no power to transfer it to any other Magistrate subordinate to him

* Criminal Revision No 671 of 1913

THE facts of this case appear from the following order of reference.

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KNOX, J.—This case was called up on a perusal of the quarterly statement. The offences charged were offences under sections 426 and 323 of the Indian Penal Code and section 24 of Act I of 1871. The case was instituted upon a complaint in writing in the Court of Thakur Hanuman Singh, magistrate of the first class, who at the time was Sub Divisional Magistrate of Amroha He examined the the complainant, and by virtue of the powers vested in him under section 192, clause (1) of the Criminal Procedure Code, he transferred the case for trial to Babu Bir Narain Singh, magistrate of the second class, subordinate to him. Before Babu Bir Narain Singh could try the case he was transferred, and under orders of the District Magistrate, dated the 30th of November, 1912, all cases pending before him went back to the court of the Sub Divisional Magistrate of Amroha. There is nothing on the record to show under what powers this order of transfer was made The officer in charge of the sub-division of Amroha was at this time Mr Panna Lal, who transferred the case for trial to Chaudhri Dharam Singh, Special Magistrate of Kanth, a magistrate subordinate to the officer in charge of the sub division of Amroha An important question arises here, whether Mr Panna Lal had powers to make this order of transfer It appears that he was not empowered by the District Magistrate to transfer the case to any other specified magistrate in his Sub Division Orders of transfer have of late been frequent in the District of Moradabad In a previous case, Criminal Revision No 635 of this year, I had before me a case in which transfers were made no less than nine times from court to court before it was decided The question is of some importance, and I direct that the papers be laid before the Hon'ble the Chief Justice in order that the question may be considered and determined by a Bench of two Judges It is a case in which the Public Prosecutor should appear on behalf of the Local Government.

The Officiating Government Advocate (Mr. *W. Wallach*), for the Crown.

KNOX and TUDBALL JJ.:—In this case the accused came first before the Court of Thakur Hanuman Singh, who at the time was the Sub-Divisional Magistrate of Amroha Thakur Hanuman Singh took cognizance of the case and then transferred it for trial to Babu Bir Narain Singh, a magistrate subordinate to him. Before Babu Bir Narain Singh could try the case he was transferred There is no formal order on the record, but we are told that on Babu Bir Narain Singh's transfer the District Magistrate, under an order dated the 30th of November, 1912, transferred all cases pending before the court of Babu Bir Narain Singh, which had ceased to exist, to the court of Mr. Panna Lal, who at the time was the Sub-Divisional Magistrate of Amroha. Among the cases so transferred was the present case. Mr. Panna

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Lal in an explanation furnished by him says that as the case was a petty one he transferred it for trial to Chaudhri Dharam Singh Special Magistrate of Kanth, and a magistrate subordinate to the Sub Divisional Magistrate of Amroha When this case first came before this Court it seemed doubtful whether Mr Panna Lal had power to make this last order of transfer We asked the Public Prosecutor to appear in the case, and after hearing him we are confirmed in the opinion that this last order of transfer was an order *ultra vires* When a District Magistrate has referred a case for trial to a Sub Divisional Magistrate, the latter has no power to transfer it to any other Magistrate who may happen to be sub ordinate to him This case was especially called up because frequent cases of transfer from other districts and specially from this district have lately come before this Court and in some cases transfers have been so frequent and have caused such extraordinary delay as to amount practically to a denial of justice We might have set aside the proceedings before the Special Magistrate of Kanth as void, but we do not think it necessary to exercise our powers in this particular case and therefore we make no further orders Let the record be returned

Record returned

APPELLATE CRIMINAL.

1914 January 13

Before Sir Henry Richards Knight Chief Justice, and Justice Sir George Knox

EMPEROR v GHURE*

Statute 24 and 25 Vict C 104 sections 1 and 2—Power of Crown to appoint a sixth Puisne Judge—Criminal Procedure Code section 417—Appeal from acquittal—Procedure

Held on a construction of sections 1 and 2 of the Letters Patent of the High Court for the North Western Provinces that it was competent to the Crown to appoint by means of its Letters Patent a sixth, Puisne Judge to the said High Court

Held also following the decision in *Queen Empress* v *Prag Dat* (1), that in the Code of Criminal Procedure there is *no apparent distinction between* the right of appeal against an acquittal and the right of appeal against a conviction *Queen Empress* v *Robinson* (2) referred to

THIS was an appeal by the Local Government from an order of acquittal passed by the Sessions Judge of Aligarh The facts

*Criminal Appeal No 827 of 1913 by the Local Government from an order of A Sabonadiere Sessions Judge of Aligarh dated the 26th of September 1913

(1) (1898) I L R, 20 All, 459 (2) (1894) I L R, 16 All, 212

of the case so far as they are necessary for the purposes of this report appear from the judgement of the Court

Mr *M L Agarwala* for the accused raised a preliminary objection to the hearing of the appeal on the ground that there was no legally constituted High Court in these Provinces The Charter Act of 1861 by section 16 empowered the Sovereign to constitute the High Court for these Provinces with as many Judges as she might from time to time appoint Under this section it was open to the Sovereign to issue a Letters Patent erecting a High Court here without mentioning the number of Judges as was done in the case of the High Courts of Calcutta Bombay and Madras Section 17 of the same Act empowered Her Majesty to revoke or amend the Letters Patent of a High Court within three years of the establishment thereof The imperative character of this section is shown by the fact that Statute 28 and 29 Vict Chap XV had to be passed in order to enable the Sovereign to issue fresh Letters Patent up to the 1st January 1866 The Letters Patent that were issued to the High Court for these Provinces fixed the constitution of the High Court at a Chief Justice and five Judges until such further or other provision as might be made by Her Majesty The only section that allows further or other provision to be made is section 17 of the Charter Act Under that section such further or other provision could only be made by a fresh Letters Patent issued within three years of the establishment of the High Court. The mere appointment of a Judge is not equivalent to the making of such further or other provisions within the meaning of section 2 of the Letters Patent

The officiating Government Advocate (Mr *W Wallach*) for the Crown was not called upon to reply to the preliminary objection

The case was then argued on the facts

RICHARDS C J and KNOX J —A preliminary objection was taken to the hearing of this appeal on behalf of the accused It is contended that this High Court is no longer properly constituted by reason of the fact that some years ago a sixth Puisne Judge was appointed In our opinion there is no force in the contention Under 24 and 25 Vict Chap 104 section 16 the Sovereign was

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authorized by Letters Patent to establish at any time thereafter a High Court of Judicature in the territories of India other than those comprised within the jurisdiction of the other High Courts The only limit as to the number and qualifications of the Judges was as therein stated By Letters Patent dated the 17th day of March of the twenty ninth year of the reign of Queen Victoria Her Majesty was pleased to constitute a High Court for the North Western Provinces in these words —

"Section 1 Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us, Our heirs and successors erect and establish for the North Western Provinces of the Presidency of Fort William aforesaid a High Court of Judicature which shall be called 'The High Court of Judicature for the North Western Provinces' And We do hereby constitute the said Court to be a Court of Record"

Section 2 is in these words —

"And We do hereby appoint and ordain that the said High Court of Judicature for the North Western Provinces shall until further or other provision shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act consist of a Chief Justice and five Judges * * *"

In our opinion it was perfectly competent by Letters Patent to appoint a sixth Judge *We accordingly overrule the preliminary* objection

The appeal is an appeal by Government against the acquittal of one Ghure on a charge of murder The circumstances connected with the case are as follows —There was a family of four brothers, Sunars, trading at Hathras The names of these four brothers were Jhunna Lal Ram Lal, Shama and Babu There were living at a place called Arjunpur, about four *kos* away, three Brahman brothers Kunwar Lal Rup Ram and the accused Ghure In October, 1911, Jhunna Lal and Ram Lal were murdered Ghure, Kunwar Lal and Rup Ram, the three Brahman brothers, were all accused of the murder Ghure was alleged to be absconding, but Kunwar Lal and Rup Ram were put upon their trial, convicted of the murder of Ram Lal and sentenced to death The sentence

was confirmed by the High Court and subsequently carried into effect.

Ghure was arrested on the 18th of July, 1913, committed for trial and tried by Mr Sabonadiere Sessions Judge of Aligarh, and acquitted. It is against this acquittal that the present appeal is preferred by Government

[After discussing the evidence their Lordships proceeded as follows —]

The learned Sessions Judge says, and most truly says, that he was bound to hear and to decide the case altogether irrespective of the fact that there had been a previous trial and conviction upheld by the High Court against the other accused There can be no doubt that the learned Sessions Judge is perfectly correct in this If the evidence as he heard it did not convince him of the guilt of the accused he was bound to acquit Just in the same way we are bound to deal with this appeal quite irrespective of the fact that another Bench of this High Court affirmed the conviction in a previous trial If the learned Sessions Judge had referred less to the judgement of his predecessor, we think his own judgement would have been less open to criticism, for instance, we do not acquiesce in his remarks about the use of the word 'apparently" by his predecessor in giving judgement in the previous case It is quite clear that the learned judge in that case meant to say that so far as he could see the witness whose evidence he was referring to was trustworthy He may have been right or wrong in this estimate of the witness but his meaning is perfectly clear

It has been argued on behalf of the accused that we ought to follow the ruling in *Queen Empress* v *Robinson* (1) In our opinion the law is correctly laid down in the case of *Queen Empress* v. *Prag Dut* (2) We must however, banish from our minds altogether *the fact of the previous trial* *Whether it was owing to the* time that had elapsed between the occurrence and the present trial, or whether it was that Nanda purposely to spoil the case gabbled forth evidence the learned Sessions Judge found him an unconvincing and unsatisfactory witness With some of the reasons he has given for not believing him we cannot agree, but as regards some of the other reasons which he has given we are not prepared

(1) (1894) I L R 16 All. 212 (2) (1898) I L R 20 All. 459

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to say they are not entitled to some weight His reasons for not relying upon the evidence of Babu are justified, though he has failed to consider the corroboration of Hub Lal on the only vital part of his evidence We are very far from saying that we believe Ghure to be innocent, far less that the conviction of the other accused was incorrect But deciding this case entirely upon its own circumstances, and influenced mainly by the remarks of so experienced a Judge on the unsatisfactory way in which the principal witness gave his evidence, we have with great hesitation come to the conclusion that we ought not to set aside the verdict of acquittal given by the learned Sessions Judge We accordingly dismiss the appeal The accused, if in custody, will be set at liberty

Appeal dismissed

APPELLATE CIVIL.

1914 January, 23

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji

MATA PALAT AND OTHERS (JUDGEMENT DEBTORS) v BENI MADHO (DECREE HOLDER) *

Civil Procedure Code (1882) sections 373 and 375A—Execution of decree—Procedure—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree

Held that the provisions of Chapter XXII of the Code of Civil Procedure (1882) which allowed withdrawal of a suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree and did not permit the withdrawal of an application for execution with permission to make a fresh application.

THIS was an appeal arising out of an application made by the decree holder to put up for sale certain interests held by the judgement debtors as included in the decree for sale The judgement debtors contended that the decree for sale included only their proprietary rights and not their mortgagee rights They further contended that on the 6th of August, 1908, the decree holder's application for sale of the mortgagee rights was on their objection disallowed by the court of first instance on the 22nd of August, 1908, that an appeal against the order, by the decree holder, was dismissed on the 15th of December 1909, and that therefore that order had the effect of *res judicata* The decree holder in reply

* Appeal No 70 of 1913 under section 10 of the Letters Patent

pointed out that, pending the appeal against the order of the 22nd of August 1908, an application was made to the appellate court for leave to withdraw with liberty to make a fresh application and therefore the order was not final The courts below dismissed the decree-holder's application On second appeal the following order was made by a single Judge of the Court —

"My judgement in Revision No 75 of 1912 should be read with the present judgement The decree holder, who is appellant is now seeking to bring to sale the mortgagee rights which his judgment debtors had in the villages scheduled in the decree and which were mortgaged to him The lower appellate Court held that the decree holder who had only got a decree for the sale of zamindari rights and not of the particular rights which he now in this application for execution wishes to bring to sale was not entitled to sell the latter rights It, therefore dismissed the application for execution confirming the order of the court below In the appeal before me four grounds were taken in the memorandum of appeal and in accordance with the view I have already taken in the other case I hold that the decree holder is empowered by the decree to bring to sale the mortgagee rights over which he is seeking to enforce his decree I find, however, that in the court of first instance it was contended that the application for execution was barred by limitation and that in the previous execution proceedings the property now sought to be sold had already been released from attachment as not being liable to sale These questions were not gone into They are really questions of law and can be decided here and I think it expedient to bring this litigation as far as possible to an end I accordingly allow the parties two weeks in which to prepare for argument on these two points and my order will be subject to my decision on these two points"

The case again coming up, the following judgement was delivered —

"In my order of the 14th of January 1913 I put an interpretation upon a decree It was however, next pointed out that two pleas which had been taken in the court below had not been considered by the Court They were pleas raising important legal points One was to the effect that the application for execution of this decree was barred by limitation The second was that in the previous execution proceedings the property now sought to be sold had already been released from attachment and was not liable to sale The first question, i e that limitation bars the application is not now pressed

The second plea is based upon a paper which is to be found on the record as Paper No 101 File A In that paper the court executing the decree had disallowed an application to have the proclamation of sale amended so as to include mortgagee rights it disallowed this application on the ground that a court executing a decree could not place this interpretation upon the decree before it An appeal was filed and the order of the court executing the decree was upheld on the 15th of December 1908 (Paper No 117 A) This paper No 117A must be read with Paper No 116 A When these two are read together the ground that the matter has already been decided is immediately cut away Both

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these pleas fail and my order of the 14th of January will stand without any limitation The result is that this appeal is allowed and the order of the court of first instance and that of the lower appellate Court are set aside and the proceedings in execution will go forward as prayed The appellant will get his costs of this appeal and the costs of the courts below'

The judgement-debtors filed an appeal under the Letters Patent

Babu *Piari Lal Banerji*, for the appellants —

The order in the earlier proceeding, dated the 22nd of August, 1908, which was confirmed on appeal, concludes the present question The order above referred to, passed in execution proceedings remained operative until it was set aside on appeal, and mere fact that pending the appeal in the appellate Court an application was made to withdraw had not, and could not have, the effect of nullifying the first order Moreover, the Code then in force and the present Code did not allow applications for withdrawal in execution proceedings He referred to section 375 A of Act XIV of 1882 and order XXIII, rule 4 of Act V of 1908

Mr *B E O Conor* (with him Mr *A H C Hamilton* and Mr *Nihal Chand*), for the respondent —

When the application for withdrawal was made by the decree holder to the appellate Court the judgement-debtors clearly intimated to the court that they had no objection to the prayer for leave being granted and the court then allowed the leave prayed for Under such circumstances they should not now be allowed to plead that the order of the first court was affirmed on appeal

Babu *Piari Lal Banerji* not heard in reply

RICHARDS, C J, and BANERJI, J —This is a judgement debtor's appeal The suit was brought on foot of a mortgage, dated the 9th of June, 1895 This mortgage was a mortgage of the zamindari rights and also of mortgagee rights A decree was obtained in 1900 Applications were made from time to time for the execution of the decree, and in the first place apparently the application for execution was limited to an application for sale of the zamindari rights mortgaged This very probably was the case, because at that time it had been held that mortgagee rights could not be sold in execution of a mortgage decree In the year 1908 the decree-holder applied for a sale of the mortgagee rights and asked the court executing the decree to put into the sale

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proclamation a statement to the effect that the mortgagee rights were being sold. Rightly or wrongly, that court decided that the decree did not include the mortgagee rights and refused the application. The decree-holder appealed, and on the case coming before the court of appeal an application was made for leave to withdraw the appeal with liberty to make a fresh application in execution. The representative of the judgement-debtors is recorded to have said that he had no objection so long as he got his costs. The decision of the court below was affirmed and the appeal dismissed with costs. The matter rested there until a further application was made by the decree-holder for the sale of the mortgagee rights. This was met with the objection first that the decree did not include mortgagee rights, and secondly, that it had already been held that the decree did not include mortgagee rights, and that order had become final. The lower appellate Court allowed the second objection and dismissed the application for execution. In Second Appeal to this Court the learned Judge held that the decree was sufficient to include the mortgagee rights, and that having regard to the circumstances connected with the application to withdraw the appeal, the present application for execution was maintainable.

We are not inclined to agree with the learned Judge of this Court that the decree was sufficient to include the mortgagee rights. On the other hand we think that, when the court executing the decree rejected the application to sell the mortgagee rights and held that they were not included in the decree and so not liable to be sold, that order was final unless it was set aside upon appeal. It never was set aside upon appeal. On the contrary it was affirmed and the appeal was dismissed. It is suggested that the provisions of Chapter XXII of Act No. XIV of 1882 permitted the withdrawal of the application for execution and gave a right to make a fresh application It will be seen by reference to section 375 A that the provisions of that Chapter did not apply to any application subsequent to the decree.

We must allow the appeal, and, setting aside the decree of this Court, restore the decree of the lower appellate Court with costs of both hearings in this Court.

Appeal allowed.

1914
February 2

Before Mr Justice Ryves and Mr Justice Piggott

MUNSHI LAL (DEFENDANT) *v* THE NOTIFIED AREA OF BARAUT (PLAINTIFF)*

Act No XVI of 1908 (Indian Registration Act) sections 17 and 90—Registration—Act No IV of 1882 (Transfer of Property Act) section 107—Act No XV of 1895 (Crown Grants Act), sections 2 and 3—Lease whether compulsorily registrable—Lease of Government land by commissioners of a notified area

The commissioners of a Notified Area let certain plots of land which were the property of the Government and had been handed over to them for administrative purposes The leases ran in the name of the Secretary of State for India and provided that the lessees were to remain in possession for 30 years so long as they fulfilled certain conditions and the lessor had a right of re-entry only on breach of certain conditions

Held that such leases were compulsorily registrable and could not be considered as falling within the purview of section 90 (*d*) of the Indian Registration Act, 1908 nor were they excluded from section 107 of the Transfer of Property Act by the operation of the Crown Grants Act 1895 *Dost Muhammad Khan* v *the Bank of Upper India* (1) referred to

THIS appeal along with several connected appeals (F A F O Nos 43 47 to 55, 63 and 77 of 1913) arose out of suits brought by the Notified Area of Baraut through its President against separate defendants who were in possession of separate pieces of property under leases granted on behalf of the Secretary of State in 1909 The leases were for a term of 30 years reserving a yearly rent which was payable half yearly and provided for two further periods of renewal of 30 years each. The leases were not registered. The material defence for the purposes of this report was that inasmuch as the leases were not registered no suit was maintainable on their basis. The Munsif accepted this defence and dismissed the suit. The lower appellate court held that inasmuch as the lessees were liable to ejectment on non payment of half yearly rent the leases were not for a term exceeding one year and were therefore not compulsorily registrable. It therefore allowed the appeal and remanded the suit The defendants appealed against the order of remand

Mr *M L Agarwala* for the appellant submitted that the leases were for a term exceeding one year and as such were compulsorily registrable. Not having been registered they could not be received in evidence

* First Appeal No 42 of 1913 from an order of J Johnston District Judge of Meerut dated the 25th of November 1912

(1) (1906) 3 A. L. J 129 and, 628.

Mr W Wallach for the respondent informed the Court that he was going to support the order of the District Judge on the ground that a lease granted by the Crown was exempt from registration by virtue of the Crown Grants Act (Act XV of 1895)

Upon this their Lordships gave the parties an opportunity to argue the case on this point On the further hearing of the case—

Mr *W Wallach* for the respondent contended that the lease in question was granted by the Collector on behalf of the Crown and as such was a grant made by the Crown and came within the provisions of the Crown Grants Act Section 2 of that Act expressly rendered inapplicable the provisions of the Transfer of Property Act to Crown grants Section 90, clause (1) (*d*), of the Registration Act also rendered inapplicable the provisions of that Act to any document purporting to be or to evidence grants or assignments by Government of land or of any interest in land. The leases in question therefore did not require registration either under the Transfer of Property Act or under the Registration Act Moreover, the general rule of law was that no enactment should be held to apply to the Crown unless expressly so declared. He cited *Secretary of State for India* v *Mathura bhai* (1)

Mr *M L Agarwala* in reply, argued that the Crown Grants Act never intended to render all the provisions of the Transfer of Property Act inapplicable to Crown grants but was enacted simply to clear certain doubts which had arisen as to the applicability of certain sections of the Transfer of Property Act This was clear from the preamble of the Act, and this High Court had so held in *Dost Muhammad Khan* v *The Bank of Upper India* (2) He also contended that a lease was not a grant, and referred to forms and precedents contained in *Davidson on Conveyancing* and *Prideaux on Conveyancing* The Registration Act in section 17, clause (1) *(d)* made leases of immovable property for a term exceeding one year, compulsorily registrable, and the exceptions enumerated in that section applied only to clauses *(b)* and *(c)* and not to *(d)* From that it was clear that the Legislature did not intend to make any exception in the case of leases granted by the Crown

(1) (1889) I. L R 14 Bom, 213 (2) (1906) 3 A. L J 129 and 628

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THE NOTIFIED AREA OF BARAUT

RYVES and PIGGOTT JJ —This is a first appeal from an order of remand and is one of a series of connected appeals which may be disposed of by a single judgement. In Baraut in the Meerut district there is certain land which is the property of Government though it has been assigned for purposes of management to the Notified Area Committee That body desired to establish a market upon this land in the neighbourhood of a rail way station. It was accordingly arranged that leases of portions of the said land should be granted for a period of years to a number of traders and merchants subject to certain conditions the object of which was to secure the effective establishment of the desired market Owing to circumstances with which we are not concerned the scheme has fallen through, the lessees have taken no action under their leases and no market has been established. The case for the plaintiffs is that the lessees have broken their contract and are liable under the terms of the contract for various sums of money, for the recovery of which these suits have been brought. The lessees set up number of defences with only one of which we are now concerned. There was indeed another technical defence impugning the right of the plaintiffs to sue upon leases in which the Secretary of State for India is the ostensible lessor but the finding that the plaintiffs are entitled to sue as assigns' of the Secretary of State has not been attacked in argument before us and appears to be correct What we have to deal with is a point of registration law In each of the suits in question the plaintiffs tendered in evidence as the basis of their claim an unregistered lease purporting to be by the Secretary of State for India in favour of the defendants The court of first instance held that all these leases required registration under the provisions of section 17 (1)*(d)* of the Indian Registration Act (No XVI of 1908), as they were not registered they were inadmissible in evidence and could not affect the immovable property described therein. If this finding is correct the suits must necessarily fail It has however, been reversed by the lower appellate court, which has remanded all the suits for disposal on the merits The defendants are appealing against these orders of remand These orders cannot be supported on the grounds on which they proceed The learned District

Judge has in effect held that each of the leases in suit is a lease for a period of not more than one year because it contains a covenant giving the lessor a right of re-entry in the event of a breach of conditions on the part of the lessee and there is at least one condition which must either be fulfilled or broken by the lessee in the course of the first year of the lease The "term" of a lease for purposes of registration must, however, be understood to mean the period for which the lessee is protected against dispossession at the will and pleasure of his lessor, or in other words the length of time for which the lessee is entitled to continue in possession provided he himself fulfils all the stipulated conditions The leases before us are therefore leases for a "term' of thirty years They are also in our opinion leases "reserving a yearly rent' The District Judge has referred to certain reported cases, such as *Khayali* v *Husain Bakhsh* (1) and *Khuda Bakhsh* v *Sheo Din* (2) The case of *Intizam Fatima* v *Ali Bakhsh* (3) was decided with express reference to the terms of the Registration Act (No XX of 1866) which was in force when the lease then under consideration was registered There does not seem to have been anything in the provisions of the leases discussed in any of these cases which bound the lessor to maintain the lessee s possession for a longer period than one year, if he did not see fit to do so, however scrupulously the lessee might have performed his part of the contract

On behalf of the respondents, however, it has been sought to show that the District Judge was right on other grounds Broadly speaking it is contended that leases by the Secretary of State for India do not require registration, whatever their terms may be This point does not seem to have been taken in the court below, and we allowed the appellants an adjournment in order that it might be fully argued

According to section 90 (1) *(d)* of the Indian Registration Act amongst the documents the registration of which is not obligatory are —

'Sanads inam title-deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land

(1) (1886) I L R., 8 All. 198 (2) (1886) I. L. R, 8 All., 405
(3) (1911) 8 A L J, 609

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SARVI BEGAM v TAJ BEGAM

from that portion It was not open to Taj Begam to plead the right of her co sharer, as she was not concerned with any question which might arise between her co sharer and Sarvi Begam Order XXI, rule 96, could not possibly apply, as the particular portion of property over which possession was sought was not in the possession of a tenant nor was any other person entitled to it, the other co sharer Shaibzadi Begam having laid no claim to it Therefore the court was bound to proceed to order possession to be delivered according to the provisions of order XXI, rule 95

[PIGGOTT, J —referred to order XXI, rule 35]

That section in its terms applied only to decrees for possession but the analogy might be extended to the present case All that Sarvi Begam wanted was that Taj Begam should be ejected and that she be given possession jointly with Sahibzadi Begam

No one appeared for the respondent

RYVES and PIGGOTT, JJ —The appellant Musammat Sarvi Begam purchased at auction the right of Musammat Taj Begam, which amounted to a specified undivided share (136 out of 192 *sihams*) in a certain house The rest of the house belonged to Musammat Sahibzadi Begam who is not a party to this proceeding The judgement-debtor, Musammat Taj Begam, seems to have been endeavouring to obstruct Musammat Sarvi Begam and to prevent her from obtaining effective possession of what she purchased The court below has ordered possession to be given under order XXI, rule 96, of the Code of Civil Procedure But this rule has clearly no application to the facts of the present case Musammat Sarvi Begam is entitled to effective possession of what she purchased namely, the undivided share belonging to Musammat Taj Begam aforesaid The provisions of order XXI, rule 95 may be read with those of order XXI, rule 35 clause (2) whenever it is a question of giving effective possession of an undivided share either to a decree holder or to an auction purchaser under a decree We amend the order of the court below by directing that actual possession be given to the appellant, Musammat Sarvi Begum in accordance with the provisions of order XXI, rules 35 and 95 The appellant will get her costs of this appeal

Order modified

1914
January 30

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

BINDESRI PANDE AND OTHERS (PETITIONERS) *v.* GOKUL (OPPOSITE PARTY).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 177(e)—Suit for ejectment in Revenue Court—Defendant pleading possession as proprietor—Question of proprietary title—Appeal.

The plaintiff sued in a Revenue Court to eject the defendant on the allegation that he (the plaintiff) was the occupancy tenant of the plot in question and the defendant was his sub-tenant. The defendant pleaded that he was in possession not as a sub-tenant of the plaintiff but as a proprietor and that the plot was his *khud kasht*.

Held that on these pleadings a question of proprietary title was in issue in the case within the meaning of section 177 (*e*) of the Agra Tenancy Act, 1901, and that an appeal lay to the District Judge and not to the Commissioner.

Dal Chand v. *Sukhanla* (1) referred to. *Udit Tiwari* v. *Bihari Pande* (2) overruled.

THIS was a reference under section 195 of the Agra Tenancy Act, 1901, made by the Commissioner of the Gorakhpur Division.

The facts were as follows:—

The plaintiff sued for ejectment alleging himself to be an occupancy tenant and the defendant to be his sub-tenant. The defendant pleaded that he was the proprietor and was not liable to ejectment. The court of first instance (Assistant Collector) decreed the suit and ordered ejectment. The defendant appealed to the District Judge, who returned the memorandum of appeal to be presented to the Commissioner. He held that no question of proprietary title was involved. The memorandum of appeal was then presented to the Commissioner, who was of opinion that a question of proprietary title was involved. He, therefore, made the present reference which came before PIGGOTT and RYVES, JJ., who referred it to a Full Bench.

Munshi *Iswar Saran*, for the appellants:—

Section 177 allows an appeal to District Judge in cases in which a question of proprietary title is raised and is in the issue in the court of first instance and in appeal. In the present case a question of proprietary title was clearly raised and was in issue in both

* Civil Miscellaneous No. 456 of 1913.

(1) (1905) 2 A. L. J. 176. (2) (1913) I. L. R. 35 All. 521.

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Bindeshri Pande v. Gokul.

courts Defendant's possession is admitted and the whole question is whether he is a proprietor or a sub-tenant A contrary view is taken in *Udit Tiwari* v *Bihari Pande* (1), and the ground on which that view is taken is that the defendants could not sue in a civil court, if they had occasion to go there and ask for a declaration of their proprietary right One of the Judges who decided the abovenamed case took a contrary view in *Kalyan Mal* v *Samand* (2) and there he followed an earlier case *Dal Chand* v *Shamla* (3)

The respondent was not represented.

RICHARDS, C J, BANERJI and RYVES JJ —This is a reference from the Commissioner of Gorakhpur under section 195 of Act II of 1901 The plaintiff sued in the Revenue Court to recover possession of a certain plot of land He alleged that he was the occupancy tenant of the plot in question and that the defendant was his sub-tenant The defendant pleaded that he was in possession of the plot, not as the sub tenant of the plaintiff but that he was the proprietor and that the plot in question was his *khud kasht* The Assistant Collector of the first class decreed the plaintiff's claim The defendant appealed to the District Judge The District Judge held that no question of proprietary title was in issue and that accordingly no appeal lay to him The memorandum of appeal was returned for presentation to the proper court It was then presented before the Commissioner, who has made the present reference

In our opinion a question of proprietary title was in issue in the court of first instance and was also a matter in issue in the appeal within the meaning of section 177 Most distinctly the defendant alleged that he was the proprietor and that he was in possession as such of the plot The plaintiff may have been prepared to admit that the defendant was a co-sharer, but he denied that he was in possession as proprietor, alleging that he himself was the occupancy tenant and that the possession of the defendant was as a sub tenant to him In the case of *Dal Chand* v *Shamla and Parma* (3) a Bench of this Court of which one of us was a member took the view that clause *(e)* of section 177 applied and

(1) (1913) I L R, 35 All 531 (2) I L R 35 All, 157

(3) (1908) 2 A L J 176

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BINDESRI PANDE v. GOKUL.

that an appeal lay to the District Judge. However in the case of *Udit Tiwari* v. *Bihari Pande* (1) a contrary view was taken, although the facts were identical. The learned Judges say "We cannot see that the defendant's title as proprietor was ever denied by the plaintiff. Certainly the latter never claimed to be himself the proprietor of the land in dispute or to have any right in the same other than the right of an occupancy tenant." It is true in the present case the plaintiff did not claim to be proprietor, and the question whether the plaintiff or the defendant was the porprietor did not arise, but section 177 provides for an appeal to the District Judge when any question of proprietary title has been and is in issue. The plaintiff denied that the defendant was entitled to possession as proprietor, though he did not deny that he was a co sharer. The importance of the case is to have a settled practice. We think that the language of the clause is wide enough to include a case like the present where one party claims actual possession as proprietor and the other side disputes such claim and that under the circumstances an appeal lay to the District Judge under section 177, clause *(e)* of the Tenancy Act. We accordingly direct that the memorandum of appeal be returned by the Commissioner and the same be received by the District Judge, who shall proceed to hear and determine the same according to law.

This is our answer to the reference. The costs of this reference will abide the result.

Memorandum of appeal returned.

REVISIONAL CRIMINAL

Before Mr. Justice Ryves and Mr. Justice Piggott.

1914 *February*

EMPEROR v. PIARI LAL.*

Act (Local) No. I of 1900 *(United Provinces Municipalities Act), section* 147—*Prosecution for disobedience to notice—Validity of the notice to be considered.*

Before anyone can be convicted of an offence under section 147 of the United Provinces Municipalities Act the court must be satisfied that what he had disobeyed was a notice lawfully issued by the Board under the powers conferred upon it by the Act.

* Criminal Reference No. 1231 of 1913.

(1) (1913) I. L. R. 35 All., 521.

1914 — Emperor v. Piari Lal

Chhotey v. Municipal Board of Lucknow (1) approved *Queen Emp ess v. Jasoda Nand* (2) referred to

THE facts of this case were as follows —

A written notice was served on one Piari Lal by the Municipal Board of Cawnpore ordering him to pull down a *chhajja* recently built by him on the eastern side of his house and also to demolish a *do-manzila* on the western side within one week He did not do so, and was charged in consequence under section 147 of the Municipalities Act (Act I of 1900) He admitted receipt of this notice, but stated that he had not constructed any building without permission, but that he had made ordinary repairs No further evidence was tendered on behalf of the prosecution The Bench trying the case held that no offence had been proved against the accused and discharged him The District Magistrate moved this Court suggesting that the validity of the notice issued by the Board was one which could only be questioned under section 152 of the Municipalities Act and that as it had not been so questioned, it was not open to the accused to attack its validity in a Criminal Court in defence of a charge under section 147

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

The opposite party was not represented

RICHARDS and PIGGOTT JJ —This is a reference by the District Magistrate of Cawnpore under the following circumstances,—A written notice was served on one Piari Lal by the Municipal Board of Cawnpore ordering him to pull down a *chhajja* recently built by him on the eastern side of his house and also to demolish a *do-manzila* on the western side within one week He did not do so and was charged in consequence under section 147 of the Municipalities Act (Act I of 1900) He admitted receipt of this notice but stated that he had not constructed any building without permission, but that he had made ordinary repairs No further evidence was tendered on behalf of the prosecution The Bench trying the case held that no offence had been proved against the accused and discharged him The District Magistrate moved this Court suggesting that the validity of the notice issued by the Board was one which could only be questioned under

(1) (1905) 9 Oudh Cases 29 (2) (1898) I L R 20 All, 501

section 152 of the Municipalities Act, and that, not having been so questioned, it was not open to the accused to attack its validity in a Criminal Court in defence of a charge under section 147 What he was exactly charged with in this case was disobedience of a written notice lawfully issued by the Municipal Board under the powers conferred upon it by Chapter VII of the Act It seems to us that before anyone can be convicted of an offence under this section the court must be satisfied that what he had disobeyed was a notice lawfully issued by the Board under the powers conferred upon it by the Act This was held in *Chhotey v The Municipal Board of Lucknow* (1) by one of us It seems also to be in conformity with the principle laid down by a Bench of this Court in *Queen Empress* v *Jasoda Nand* (2) Let the papers be returned

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EMPEROR v PIARI LAL

[See also *Emperor* v *Ram Dayal* (1910) I L R, 33 All, 147 Ed]

PRIVY COUNCIL.

P C* 1913 November 7 11, 12 13 1914 February 6

BRIJ LAL (DEFENDANT) v INDA KUNWAR (PLAINTIFF)

[On appeal from the High Court of Judicature for the North Western Provinces at Allahabad]

Hindu law—Alienation by Hindu widow—Burden of proof—Evidence of legal necessity—Recitals as to evidence of necessity in mortgages or sale deeds

The *onus* of supporting a sale from a Hindu widow is on the purchaser

Recitals in mortgages or deeds of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not of themselves evidence of such necessity without substantiation by evidence *aliunde*

APPEAL from three judgements and decrees (two of them, dated the 23rd of December, 1909, and the third dated the 8th of March 1910) of the High Court at Allahabad, which partly affirmed and partly reversed two judgements and decrees (dated the 27th of November, 1907, and the 13th of December, 1907) of the Subordinate Judge of Bareilly

This appeal arose out of two suits (62 and 63 of 1907) instituted against the appellant and others The former of them was brought on the 18th of April 1907, by the respondent Inda Kunwar to recover possession of a 10 biswa share of a zamindari village

* *Present*:—Lord SHAW, Lord MOULTON and Mr AMEER ALI.

(1) (1905) 9 Oudh Cases, 29 (2) (1898) I L R., 20 All, 201.

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named Khalchipur, and the latter suit was brought, on the same date, by the other respondents Het Ram, Munna Lal, Lila Dhar and Narain, and by one Lachhman (since deceased and now represented by those respondents) for possession of the other 10 biswa share of the said village. The following pedigree shows the relationship of the parties

KUNDAN LAL.

Sham Lal = Musammat Nimma

Mihin Lal — Liladhar = Musammat Rukmin

Musammat Bhauna alias Mulo, wife of Hulas Rai

(children of Musammat Bhauna and Hulas Rai:)

Paran Sukh — Liladhar (plaintiff), Narain (plaintiff)

Tula Ram — Het Ram (plaintiff), Munna Lal (plaintiff)

Dal Chand = Musammat Bhauna alias Nanhi

Jadon Rai — Lachhman (plaintiff)

The appellant Lala Brij Lal had been for more than 30 years in possession of the 20 biswas of Khalchipur under sales executed by Musammat Rukhmin, Musammat Nimma and Musammat Bhauna the widow of Dal Chand.

The plaintiffs in the two suits claimed as the reversioners of Lila Dhar and Dal Chand, and contended that the sales were not made for legal necessity, and were therefore not binding on the reversioners, the main defence in both suits being a denial of the above allegations

For the purposes of this report the facts are sufficiently stated in the judgement of their Lordships of the Judicial Committee

In suit 62 of 1907, the Subordinate Judge made a decree in favour of the plaintiff, Inda Kunwar, in respect of 2 biswas provided she redeemed that share by paying the defendants a proportionate amount due to them under a certain mortgage on the village, but as regards the remaining 8 biswas the Subordinate Judge dismissed the suit

The other suit, 63 of 1907, was wholly dismissed by the Subordinate Judge

In suit 62, the High Court (SIR JOHN STANLEY, C J and BANERJI, J) decreed the plaintiff's claim, allowing her appeal, and dismissing a cross appeal brought by the defendants The High

Court also allowed the appeal in suit 63 of 1907, and made a decree in favour of the plaintiffs The defendant Lala Brij Lal (now appellant) applied for leave to appeal to His Majesty in Council from each of the three decrees against him, and the applications were granted and the three appeals consolidated by order of the High Court

On the consolidated appeal

As to there being legal necessity for the sales

De Gruyther, K C and *J M Parikh*, for the respondent contended that the *onus* of showing that there was such necessity was on the appellant, and he had not discharged it Reference was made to Mayne's Hindu Law, 7th edition, page 862, section 640 The mere statement in the documents that legal necessity existed for the sale was not sufficient to prove that that was so and there was no other evidence to support it *Maheshur Bakhsh Singh* v *Ratan Singh* (1)

Sir Erle Richards K C and *B Dube* for the appellant contended that the sales made by Rukhmin and Bhauna, widow of Dal Chand were made for legal necessity, and were binding on the reversioners

The *onus* was on the respondents to show the want of legal necessity Reference was made to Mayne's Hindu Law, 7th edition, page 840, section 624, and page 460, section 349 as to the law of necessity *Maheshur Bakhsh Singh* v *Ratan Singh* (1) and *Deputy Commissioner of Kheri* v *Khangan Singh* (2)

De Gruyther, K C replied

1914, February 6th —The judgement of their Lordships was delivered by Mr AMEER ALI

The suits which have given rise to this consolidated appeal from three decrees at the High Court at Allahabad relate to a property called mauza Khilchipur lying in the district of Bareilly in the United Provinces of India

The mauza is now in the possession of the defendant appellant under a usufructuary mortgage executed in 1871 in favour of his ancestor Madho Ram by two Hindu ladies, Rukmin and Nimma,

(1) (1895) I L R., 23 Calc, 766 L R., 23 I A., 57

(2) (1907) I. L R 29 All., 331 (338) L R., 34 I. A 164 (172)

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and one Dal Chand Other titles were created subsequently in favour of Madho Ram or his son Darbari Lal, to some of which reference will be made in the course of this judgement. But the plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871

Mauza Khulchipur belonged originally to one Kundan Lal He died many years ago, leaving two sons Mihin Lal and Sham Lal, who, it is not disputed were joint in food and estate Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death the whole property devolved on Lila Dhar Lila Dhar died in 1861 when Rukmin, his widow, became the owner, taking a widow's estate under Hindu law But although Rukmin as the widow of the last full owner was entitled to the entire property, it would appear that Sham Lal's widow claimed, or was acknowledged to possess, an equal interest with Rukmin In 1862, the two widows jointly sold a half or 10 biswa share of the village to Dal Chand, who is said to have been Rukmin's manager In 1871, the three, Dal Chand, Rukmin, and Nimma executed the usufructuary mortgage referred to above for a period of 12 years in respect of the entire mauza, represented as 20 biswas, in favour of Madho Ram the conditions being that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage money' or interest Dal Chand died, it is said, in 1873, and in 1874 his widow Bhauna sold the equity of redemption in respect of eight biswas out of the 10 biswas he had acquired from Rukmin and Nimma to the son of Madho Ram, Darbari Lal, and his widow, Chando, one of the defendants in the present suits The equity of redemption in respect of the remaining two biswas was sold in execution of a decree against Bhauna, and passed ultimately into the hands of the *appellant*

It is unnecessary for the determination of this appeal to refer to the subsequent transactions by which Madho Ram's son acquired the equity of redemption in respect of the 10 biswas that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dal Chand

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The Brahman plaintiffs claim to be the reversioners of both Lila Dhar and Dal Chand They allege that Bhauna, Dal Chand's widow died in 1905 Nimma in 1906 and Rukmin a few years ago and that upon their respective deaths whatever rights they had purported to create in favour of Madho Ram came to an end and they are entitled to possession of the entire property They have transferred a moiety of the mauza with all the appurtenant rights to Inda Kunwar who brings one suit in respect of the share purchased by her whilst the Brahman plaintiffs have sued separately for the other share claimed by them

With regard to the 10 biswas Dal Chand had purchased from Rukmin and Nimma they allege that the sale of the equity of redemption in respect of eight biswas by Bhauna was without legal necessity and that the execution sale of the two biswas was in respect of a personal decree against her and that consequently, neither transaction is binding against them

The contesting defendants the representatives of Madho Ram, denied that the Brahman plaintiffs were the reversioners of either Lila Dhar or Dal Chand, that their claim was barred by the Statute of limitations, as Rukmin, the widow of the last full owner died more than 12 years before suit and that even if the Brahman plaintiffs were the reversioners of Lila Dhar or Dal Chand the transactions impugned by them were for legal necessity and consequently binding against them The two suits were tried together and although in consequence of the decree of the Subordinate Judge there were three separate appeals to the High Court they were heard together, and subsequently on an application for leave to appeal to His Majesty in Council, all three appeals were consolidated The case has thus come before their Lordships as a single consolidated appeal Their Lordships propose therefore in order to avoid confusion to deal with the two suits as one consolidated action from the outset The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman plaintiffs to Lila Dhar was wholly untrustworthy He therefore did not consider it necessary to enter upon an inquiry as to the time of Rukmin's death

He held however that the Brahman plaintiffs (save Lachman) were the reversioners of Dal Chand being his brother's sons,

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that the sale of the equity of redemption by Bhauna in respect of eight biswas was for legal necessity, but that there was no proof that the sale by auction of the two biswas in execution of the decree *against her was "in satisfaction of a debt contracted by her* for legal necessity" He accordingly made a decree in Inda Kunwar's suit for the redemption of the mortgage of 1871 in respect of two biswas, and dismissed the rest of her claim as well as the claim of the Brahman plaintiffs in their suit.

From these decrees there were as already observed, three appeals to the High Court, one by the defendants in respect of the two biswas, and the two others by the two sets of plaintiffs, namely, Inda and the Brahmans respectively

As regards the relationship of the Brahman plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge They hold that it is satisfactorily established that they are the descendants of one Bhauna alias Mulo a daughter of Kundan Lal, and therefore related as *bandhus* to Lila Dhar, Rukmin's husband They have further held that the sale by Rukmin and Nimma in 1862 to Dal Chand, the mortgage of 1871 by these three to Madho Ram, and the sale of the equity of redemption by Bhauna Dal Chand's widow, in respect of eight biswas, were without legal necessity They have also held that Rukmin was alive within 12 years from date of suit They accordingly reversed the decree of the Trial Judge by which he had dismissed the plaintiffs claim in respect of eighteen biswas, and, affirming his order in respect of the two biswas, made a decree in favour of the plaintiffs in both suits

In the present appeal the defendant Brij Lal, the grandson of Madho Ram, challenges all the conclusions of the High Court The *case as presented at their Lordships' Bar is divisible into two* parts, one relating to the reversionary right to Dal Chand's estate, the other to Lila Dhar's It is not disputed now that the Brahman plaintiffs including Lachman are the sons of Dal Chand s brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the eight biswas was for legal necessity The *onus* of supporting a sale from a

Hindu widow is undoubtedly on the purchaser In the present case the appellant has adduced no evidence to prove such legal necessity as would bind the husband s estate He has relied simply on the recitals in the schedule attached to the sale deed Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*

In these circumstances, their Lordships are of opinion that the conclusion of the High Court with regard to the sale by Bhauna of the equity of redemption in respect of the eight biswas is well founded

Respecting the other two biswas which belonged to Dal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity In the result, therefore as regards the share purchased by Dal Chand from Rukmin and Nimma in 1862, and which he jointly with them mortgaged in 1871 to Madho Ram, the Brahman plaintiffs, as reversioners of Dal Chand, are entitled to the same

The position respecting the other 10 biswas seems to their Lordships quite different The right of the plaintiffs to that share rests on the allegations that they are the grandsons of one Bhauna alias Mulo, who was a daughter of Kundan Lal and the sister of Sham Lal and Mihin Lal There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the plaintiffs was a daughter of Kundan Lal It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property to Dal Chand the uncle of the plaintiffs, on which occasion the relationship of Lila Dhar, Rukmin s husband, was stated with some particularity a reference should be made to the vendee's connection with the family Other documents of a similar nature are equally silent As observed already, the plaintiffs' allegation rests entirely on oral testimony Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the plaintiffs witnesses, their Lordships have closely examined the evidence and they cannot help considering it to be

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of a very dubious character The witnesses had to prove only one link in the chain of relationship, the discrepancies therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihan Lal as worthless In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago The plaintiffs allege she went on a pilgrimage, and was last heard of eight or nine years before the action The defendant, on the other hand, says she had to leave her home a considerable time before owing to having been outcasted for unchastity Most of the witnesses who speak to her being recently alive state they obtained their information from Het Ram, one of the plaintiffs who has not thought fit to enter the witness box On the other hand, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home

On the whole, it appears to their Lordships that the plaintiffs have failed to establish their right to recover possession of the remaining 10 biswas, as reversioners to Rukmin's husband The decree of High Court in the suit of Inda Kunwar omits, however, from consideration the covenant in the deed of mortgage which provides that at the time of redemption the mortgagors —

"Shall be liable for the amount of arrears and the amount of *takavi* advances and the amount advanced on account of seed which may be due to the mortgagee by the tenants of the village according to the entries in the *patwari's* papers"

Their Lordships are of opinion that the decrees of the Courts in India should be discharged, that the claim of the Brahman plaintiffs in their suit should be dismissed and in the suit of Inda Kunwar who has acquired the 10 biswas, which alone the Brahman plaintiffs had a right to sell, there should be a declaration that she is entitled to recover possession of the same from the defendant appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee defendant upon the taking ,

of proper accounts on the basis of the above recited covenant within a time to be specified by the High Court

And their Lordships will humbly advise His Majesty accordingly

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the appeals to the High Court and to this Board

Solicitors for the appellant *Barrow Rogers & Nevill*

Solicitor for the first respondent *Edward Dalgado*

J V. W

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*P C
1913
December, 9
1914
February 6

BAKHTAWAR BEGAM (DEFENDANT) v HUSAINI KHANUM AND ANOTHER (PLAINTIFFS) And cross appeal two appeals consolidated

[On appeal from the High Court of Judicature for the N W Provinces at Allahabad]

Limitation—Suit for redemption—Mortgage by conditional sale—Specified period for redemption—Payment of mortgage debt within specified time—Accrual of cause of action—Act No XV of 1877 (Indian Limitation Act) schedule II article 148

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specified period But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property Such a provision is usually to the advantage of the mortgagor

The father of the plaintiff executed a mortgage by way of conditional sale on the 6th of January 1830 in respect of 12 villages in favour of the predecessor in title of the principal defendant and there was at the time of execution a contemporaneous agreement that the sale would be cancelled on payment of the amount of consideration in nine years ' In a suit brought on the 6th of January 1899 for redemption the High Court held on the construction of the contract that the suit was not barred as the right to redeem only arose on the expiry of the nine years

Held by the Judicial Committee that the case must be decided not on the construction of the contract but on the case made by the plaintiff on the pleadings, which was that she was entitled under the agreement to redeem the property within the period of nine years and by the statement of account produced with the plaint which showed that the mortgage debt was actually satisfied under the contract on the 4th of September 1838 and that being so the right to redeem then accrued and the whole suit was therefore barred, not having been brought within 60 years from that date [article 148 of schedule II of the Limitation Act XV of 1877]

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* *Present:*—Lord SHAW, Lord MOULTON, and Mr AMEER ALI

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BAKHTAWAR BEGAM v. HUSAINI KHANUM

Two consolidated appeals (26 and 27 of 1911) from a judgement and decree (16th April and 11th November, 1907) of the High Court at Allahabad which reversed a judgement and decree (4th January, 1904) of the Court of the Subordinate Judge of Cawnpore

The facts of the case are sufficiently stated in the report of the appeal to the High Court (Sir JOHN STANLEY, C J and Sir WILLIAM BURKITT, J) which will be found in I L. R. 29 All, 271

The main question for decision in these appeals was whether the plaintiffs were entitled to redeem a mortgage alleged to have been executed in the year 1830

De Gruyther, K C and *B Dube* for Bakhtawar Begam, the appellant in appeal 26, and first respondent in appeal 27, contended that the suit was wholly barred by the limitation of 60 years, which began to run from the date of the mortgage, the 6th of January, 1830, or at any rate before the expiry of the nine years, within which period the plaintiffs admitted there was a provision allowing the redemption of the mortgage The plaintiffs came into court on the allegation that the mortgage debt was satisfied on the 4th of September 1838, and as the suit was not instituted until the 6th of January, 1899, it was barred under article 148, schedule II, of the Limitation Act, 1877 Section 62 of the Transfer of Property Act was also referred to

Sir Erle Richards, K C and *Ross K C* for Husaini Khanum, and Yusuf Husain Khan, the respondents in appeal 26 and appellants in appeal 27, contended that on the contract between the parties the plaintiffs could not sue for redemption before the expiry of the nine years the parties intended that the mortgage debt should remain outstanding for that period, and a suit to redeem the mortgage before that period would have been premature: see *Vadju* v *Vadju* (1), where it was held that the use of the word " within " was not a sufficient indication of an intention that the mortgagor might redeem in a less period than ten years The High Court therefore wrongly held that the suit was in any way affected by limitation.

G C O Gorman for Jamna Narain representing the second respondent in appeal 27, whose contentions were the same as those for Bakhtawar Begam.

(1) (1880) I. L. R., 5 Bom., 22

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De. Gruyther, K. C, replied.

1914, February 6th:—The judgement of their Lordships was delivered by Mr. AMEER ALI.

The suit which has given rise to these consolidated appeals from a decree and judgement of the High Court at Allahabad was instituted by the plaintiff respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January, 1830. The suit was brought on the 6th of January, 1899, and the only and vital question presented at the Bar for determination in this case is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

The plaintiff Husaini Khanum alleges that on the 6th of January, 1830, her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata-ullah Khan, since deceased. The other plaintiffs are persons who have acquired title from Husaini Khanum. The principal defendant in the action was one Ali Husain Khan, who was the representative of Ata ullah. He died since the decision by the High Court in the appeal from the decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the appellant. The remaining defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court, dated the 18th of September, 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognized throughout India, and its incidents have been embodied in section 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee, who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the

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contract, the sale would be cancelled, and he would re-convey the property to the mortgagor On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale

The proceeding which contains the contract in this case is set out in full in the judgement of the High Court The only material part to which their Lordships need refer is the clause relating to repayment which runs as follows —

'On being asked Sital Prasad, attorney of Ata ullah Khan stated that his client had executed and made over to Mirza Aman Ali and Fateh Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years, and that therefore, the sale was not an absolute but a conditional sale "

The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Art 148, Sched II, Act XV of 1877) The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred The High Court of Allahabad on appeal have taken a different view The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred They accordingly decreed the plaintiff's claim in respect of seven villages and dismissed it with regard to the rest.

The defendants have appealed from the first part of the High Court decree, against which there is a cross appeal on the part of the plaintiffs

The first question to determine is whether the plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto* The learned Judges dealing with this point give expression to their opinion in the following passage in their judgement .—

"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years the plaintiffs' claim is barred by limitation If, on the other hand the intention of the parties was

that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period Ordinarily, a mortgagor cannot before the time limited for payment to the mortgagee expires take proceedings to redeem The reason for this is that it was the agreement of the parties that the mortgage should during the intervening time, remain as security for the money advanced and therefore it is not competent for either party to disturb that relation

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And they refer to a number of cases in support of their conclusion Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property Such a provision is usually to the advantage of the mortgagor In the present case, had the matter depended only on the construction of the contract as given in the proceeding of the Collector, much might be said in support of the High Court's conclusions The expression that " the sale would be cancelled on payment of the consideration in nine years " is certainly ambiguous

But here the plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property In the second paragraph of the plaint the plaintiffs state as follows —

' The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages that the amount of profits, if any which shall remain after paying the Government revenue, interest and pay of the persons making the collections, would be owned by the mortgagors and applied in the payment of the principal and that whenever the mortgage money would be satisfied (out of the usufruct) or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed

And the fact is emphasized in paragraph 8, which is in these terms —

The whole amount of the principal mortgage money with interest mentioned in the mortgage deed was paid up at the end of the year 1245 Fasli according to the account which is annexed to this plaint and forms part of it No portion of the mortgage money interest or any other demand is now due on the other hand there is a surplus amount due to the plaintiffs '

In their Lordships' judgement this is not a case of a wrong construction of a clause or condition in the contract It is a

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contract, the sale would be cancelled, and he would re-convey the property to the mortgagor On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale

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APPELLATE CIVIL.

14 January, 20

Before Sir Henry Richards, Knight Chief Justice and Justice Sir Pramada Charan Banerji.

JAWAHIR MAL AND OTHERS (PLAINTIFFS) v INDOMATI AND OTHERS (DEFENDANTS) *

Act No IV of 1882 (Transfer of Property Act) sections 58 and 100—Construction of document—Mortgage—Charge

A deed commenced by reciting that the executant had borrowed a certain sum of money from certain persons and then proceeded to refer to a certain share in a property, and finally there was a clause by which the executant undertook that until repayment of the amount he would not transfer the property by sale mortgage, gift or in any other way, but there was in no part of the document any expression conveying the idea of mortgage or hypothecation, nor was there any reference to any right of sale in the property

Held by RICHARDS C J, that it was the intention of the parties to make the property mentioned *therein security for the loan* and interest and that the document created a charge within the meaning of section 100 of the Transfer of Property Act, 1882 But as there was no transfer of any interest, for the purposes of securing the loan in the property mentioned in the deed, it was not a simple mortgage within the meaning of section 58

Per BANERJI, J *contra* The intention was that the persons who had lent the money should have a right to realize their money from the property by causing it to be sold The document was therefore a simple mortgage within the meaning of section 58 of the Transfer of Property Act *Martin* v *Pursram* (1) referred to

THIS was a suit for sale upon a document which the plaintiffs put forward as a mortgage

One Chaudhri Raj Kumar borrowed money in 1884 and executed a document, the following clauses of which are material

'(1) I have borrowed the sum of Rs 1 000, half of which is Rs 500 out of 20 biswas *zamindari* in Kankauli, pargana Bhojpur,—a one third *zamindari* share is owned by me—from Lalas Baldeo Das and Shiv Dat Rai—and have brought it to my use

(2) I will not transfer this property by way of sale, mortgage or gift etc so long as I do not repay this loan and if I do the transfer shall be void'

Raj Kumar died, and a suit was instituted on the 6th of August, 1910, for sale by the representatives of the creditor against his heirs and subsequent transferees of the property The defence, so far as is material for this report, was that the document created no hypothecation or pledge of the property and that there was no mortgage which could be enforced The suit having been brought

* First Appeal No 69 of 1912 from a decree of Gauri Shankar Subordinate Judge of Farrukhabad dated the 7th of November, 1911

(1) N.-W. P., H. C R., 1867, p 124.

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more than twelve years after the execution of the deed was barred by limitation. The plaintiffs alleged that section 31 of the Limitation Act, 1908, had extended the period of limitation to the 1st of August, 1910, and the suit was thus within time. The court below held that the transaction did not amount to a mortgage, but at the best created a charge and that section 31 of the Limitation Act had not extended the period of limitation in favour of a charge holder. It, therefore dismissed the suit. The plaintiffs appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Lalit Mohan Banerji*), for the plaintiffs —

A mortgage creates a right in favour of the mortgagee to sell the property and this power may be given by implication. The deed in question does not expressly give such a power, but the debtor promises not to transfer the property so long as the debt is not paid. It is, therefore, a simple mortgage as defined in clause *(b)* of section 58 of the Transfer of Property Act. In the case of a simple mortgage there need not be any transfer of proprietary rights, *Sri Raja Papamma Rao* v *Sri Vira Pratapa H V. Ramachandra Razu* (1). In the document in suit the property is secured for payment of a debt, and I submit it was not necessary to add a further stipulation that an interest in the property was transferred. There is a creation of right to have the property sold and it amounted to a mortgage. *See* the dissentient judgement of MAHMOOD, J, in *Gopal Pandey* v *Parsotam Das* (2). No particular words are necessary to create a mortgage. Intention to secure the property is enough, *Martin* v *Pursram* (3) *Kishan Lal* v *Ganga Ram* (4).

A distinction has been drawn between a charge and a mortgage. A simple mortgage has to satisfy two requirements —

(1) There must be a covenant to repay, and (2) an express or implied covenant that in the event of non payment the mortgagee may have a power to sell the property through the court, *Shib Lal* v *Ganga Prasad* (5), *Sheoratan Kuar* v *Mahipal Kuar* (6), *Govinda Chandra Pal* v *Dwarka Nath Pal* (7).

(1) (1896) I L R, 19 Mad 249
(2) (1882) I. L R., 5 All, 121 at 138.
(3) N-W P, H C Rep 1867 124.
(4) (1890) I L. R 13 All., 28
(5) (1884) I L. R. 6 All 551
(6) (1884) I L. R, 7 All, 258.
(7) (1908) I L R. 35 Calc, 837.

I submit that the transaction in this case amounts to a mortgage, and the suit, therefore is not barred by limitation, having been brought within the time extended by section 31 of the Limitation Act

Dr *Satish Chandra Banerji*, for the respondents —

The only question is about the proper construction to be placed on the so-called mortgage-deed There are no words assigning any right to the mortgagee, and unless there is a transfer of an interest in the property there can be no mortgage The document must be construed as it stands, no words can be added to it If there was a mistake, the plaintiff's obvious remedy was to get it rectified or reformed The Transfer of Property Act has now laid down that there can be no mortgage unless an interest is *transferred* in favour of the mortgagee by way of security for purposes defined There is a distinction between an English mortgage and a simple mortgage inasmuch as the English mortgagee can sell without the help of the court, whereas the simple mortgagee has to ask the court's help but a transfer of an interest is necessary in both cases The interest transferred is the right to sell with or without the assistance of the court

There is a substantial difference between a simple mortgage and a charge *e g*, a charge cannot be created for a future loan or to provide for a future contingency, *Madho Misser* v *Sidh Binaik Upadhya* (1), *Harjas Rai* v *Naurang* (2) In the N W. P H C Reports case the Judges spoke of a hypothecation which means a pledge and not a mortgage strictly so called. Here at the most there is a charge which does not amount to a mortgage The Transfer of Property Act was drafted by English lawyers who had English notions A charge has been held in England to be different from a mortgage, inasmuch as in the former case there is no transfer of any property, but only a particular fund is indicated out of which the money is payable, *Rubbinson* v *Hale* (3), *Tancreed* v *Delagoa Bay* and *East Africa Ry Co* (4) The only case in which the distinction between a mortgage and a charge has been considered with reference to the provisions of the Transfer of Property Act is *Govinda Chandra Pal* v *Dwarka Nath Pal* (5).

(1) (1887) I L R 14 Calc 687

(2) (1906) 3A L.J 220

(3) (1884) 12Q B D., 347 (350)

(4) (1889) 23Q B D, 239 (242)

(5) (1908) I L R. 35 Calc 837 (843)

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In the cases cited by the appellants, words like *arh* or *mushtaghrak* were to be found, which would show the intention of parties was to create something more than a mortgage In certain cases in this Court even words like *arh* and *mushtaghrak* have been held to mean a charge only ; *Moti Begam* v *Har Prasad* (1), *Masuma Khatun* v. *Tahira Khatun* (2) Further, a mere stipulation not to transfer property till the money is paid does not amount to even a charge; *Bhupal* v *Jag Ram* (3) Even a general reference to property has been held to make a good mortgage, see *e g*, *Ram sidh Pande* v *Balgobind* (4)

Munshi *Gulzari Lal*, in reply —

The practice of this Court has always been to treat such documents as mortgages

RICHARDS, C J —This appeal arises out of a suit in which the plaintiffs sought to recover a sum of Rs 6,000 upon foot of a document, dated the 12th of May, 1884 Rs 7,294 is said to be due, but only Rs 6,000 is claimed Extracts of material parts of the document have been set forth in the judgement of the learned Subordinate Judge The document itself is somewhat incorrectly translated at page 4 of the appellant's book It commences by reciting that the executant had borrowed Rs 1,000, and then proceeds to refer to certain property Then there is a covenant to repay the amount with interest at the rate of 2 per cent per mensem in 7 months and that if the executant failed to pay the amount at the stipulated period, then, in future, interest should be paid at the rate of 2 per cent. per mensem Finally, there is a clause in which the executant undertakes that until repayment of the amount he will not transfer the property by sale, mortgage, gift or in any other way There is in no part of the document any use of the word ' hypothecate" or anything equivalent thereto, but it is quite possible that there was an accidental omission to insert some such word The defendants pleaded a number of defences, including a plea that the document was not sufficient to constitute a hypothecation of the property There was another plea that the property had been purchased by the contesting defendants at sale on a foot of a prior mortgage.

(1) (1913) 11 A L J, 570
(2) (1913) 11 A L J, 580
(3) (1879) I L R, 2 All., 449
(4) (1886) I. L. R, 9 All., 158.

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None of these matters have been gone into by the court below, which held the document was not a mortgage, and that, therefore, the suit was barred by limitation even if the document was sufficient to operate as a charge within the meaning of section 100 of the Transfer of Property Act.

As already pointed out, the document was executed on the 12th of May, 1884 No step of any kind has been taken on foot of the document until the institution of the present suit, and while the court below has not gone into the question of the priority of the claim of the answering defendants there can be no doubt they purchased at auction sale, and the plaintiffs have waited until the debt (if not discharged) has become greater than the value of the property In my opinion having regard to the words used in the document we ought to hold that it was the intention of the parties to the deed to make the property therein mentioned security for a loan of Rs 1,000 and interest The important question is whether or not it constituted a "mortgage" If the document is not a mortgage within the meaning of section 58 of the Transfer of Property Act then the present suit is barred, and I confess I have not much sympathy with the plaintiffs who did not institute their suit until the very last day of limitation, taking advantage of the period of grace allowed by the Limitation Act of 1908 I have already pointed out that, whether by accident or otherwise, there is an absence of any word equivalent to the word 'hypothecate" or "mortgage ' *There is also no reference to any right of sale in the* mortgagee There is merely the mention of the property, a covenant to pay the principal, and a covenant not to alienate the property so long as the principal and interest remain unpaid Section 58 of the Transfer of Property Act defines a mortgage as being "a transfer of an interest in specific immovable property for the purpose of securing the payment of money, etc " "Mortgagor" is defined as being the person who so transfers an interest, and "mortgagee" is defined as being the person to whom that interest is transferred Clause *(b)* defines a simple mortgage in the following words :—" Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that in the event of his failure to pay according to the contract, the mortgagee shall

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have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee." It seems to me that the meaning of the expression "mortgagor" and "mortgagee" in clause *(b)* of section 58 must be in accordance with the definition of "mortgagor" and "mortgagee" given in the very same section of the Act. Now I consider in the present case that there was no "transfer of any interest" for the purpose of securing the loan by Chaudhri Raj Kumar, the executant of the document sued upon in the property mentioned in the deed. If this be so, the persons in whose favour the document was executed and their representatives are not "simple mortgagees" and the document sued on is not a "mortgage" within the meaning of clause *(b)* of section 58. Section 100 of the Transfer of Property Act provides as follows: "Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge." I am quite prepared to hold from consideration of the terms of the document itself that the parties did intend to make the property security for the payment of Rs. 1,000, and interest, and if they had brought their suit within twelve years from the money becoming due, I would be prepared to hold that the plaintiffs were entitled to recover the amount by sale of the property if there was no other defence.

This was all that was held in the case of *Martin* v. *Pursram* (1), which is no authority as to what constitutes a simple mortgage as defined by section 58 of the Transfer of Property Act.

It is said that the making of the property liable for the loan is "a transfer of an interest." I cannot follow the reasoning. No

(1) N.-W. P., H. C. Rep., 1867, p. 124.

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doubt the making of the property liable for the loan creates an interest in the person in whose favour the document is made but it is not "a transfer of an interest for the purpose of securing the payment" The transfer of the interest is one thing, the purpose for which the transfer is made is another The absolute owner of property may transfer his interest for the purpose of securing a loan, so also may the owner of a lease hold interest transfer that interest, or the owner of either of such interest may transfer a right to possession In all such cases there is a "transfer of an interest" If the mere intention of making the property security for a loan is the "transfer" of an interest then a charge under section 100 is the transfer of an interest also No doubt section 58 is very confusing The terms of clause *(a)* seem to point to the fact that the draftsman had the idea of an English mortgage in his mind, and yet we have in the same section a simple mortgage defined by clause *(b)*, and an English mortgage defined by clause *(e)* It must be admitted also that for many years in these Provinces documents which commenced with words 'I hypothecate" or words equivalent thereto, have been regarded as mortgages In the present case, however, these words are entirely absent, not only from the operative part but also from the description given of the document itself at the conclusion

The importance of the distinction between a mortgage under section 58 and a charge under section 100 created by act of parties has ceased to be of any importance since the decision of their Lordships of the Privy Council, in which it was held that a suit for sale on a simple mortgage must be brought within twelve years This ruling, if I may say so with great respect, has been and will be of the utmost benefit to the people of these Provinces It was perhaps equitable having regard to the previous decisions of this Court as to the time within which suits on mortgages might be brought, to allow the period of grace provided for by the Limitation Act of 1908 though I fear that the latter enactment has led to the bringing forward of very numerous bogus claims

On the whole I am of opinion that the decision of the court below was correct and ought to be affirmed

BANERJI, J—The question in this case is whether the document upon which the suit has been brought is a simple mortgage or not

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within the meaning of the Transfer of Property Act In deciding this question we should, I think, keep out of consideration the fact that the suit is one to enforce a stale claim The decision of the point at issue depends upon the construction of the document which is the foundation of the plaintiff's claim That document is most inartistically drawn The opening portion of it is meaningless unless we assume that the person who engrossed the document omitted to insert the word "mortgage" or "hypothecate" before the description of the property mentioned therein Otherwise, the opening clause of the document is not only ungrammatical but unmeaning Indeed the translator of this court, who has translated the document, has inserted the words "and have hypothecated to the aforesaid persons" in order to give some meaning to the *clause* In *construing a document of this kind we should look* to the intention of the parties, and if that intention can be gathered from the document itself, it is our duty to give effect to it It has been held that the mere fact of the omission of the word "mortgage" or of a clause giving the mortgagee the right to bring to sale the property which was made security for the debt is not sufficient to take the document out of the category of an hypothecation In the case of *Martin* v *Pursram* (1) a document very similar to the one before us was held to create a hypothecation and in a number of cases decided both before and after the Transfer of Property Act by this Court, a document which creates a hypothecation of immovable property has been construed to be a simple mortgage The Transfer of Property Act it has been repeatedly held, *has only* codified what was before its enactment the law of mortgage in this country Section 58, no doubt, provides that a mortgage is a transfer of an interest in specific immovable property for the purposes of securing the payment of money advanced and for the other purposes mentioned in the section. A hypothecation or pledge of specific immovable property is in my opinion a transfer of an interest in the property hypothecated or pledged It is a conveyance of a portion of the borrower's interest to the lender, because by virtue of it he is entitled to bring to sale the property which is made security for the debt Every document by which specific immovable property is made security for

(1) N.-W P H C. Rep, 1867, p 124

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the repayment of a debt carves out in favour of the mortgagee a portion of the borrower's interest in the property and is thus a transfer and a simple mortgage within the meaning of section 58. In this country there can be no transfer of interest in the same way in which in the case of a mortgage in England the property mortgaged is conveyed to the mortgagee. In the present instance the intention, it seems to me, was clear that the person who had lent the money would have a right to realize his money from the property by causing it to be sold. Otherwise the provision in it forbidding a transfer of the property until the debt was repaid would be unmeaning. I hold that the document in this case was intended to be and is a simple mortgage within the meaning of the Transfer of Property Act, and, therefore, it cannot be a charge within the meaning of section 100 of that Act. A charge under that section arises only when the transaction does not amount to a mortgage. In my opinion the view taken by the court below is not correct, and the case ought to be remanded to that court for trial on the merits.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1914
February, 5

Before Mr. Justice Ryves and Mr. Justice Piggott.

JAGARNATH SAHU v. PARMESHWAR NARAIN.*

Criminal Procedure Code section 133—Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows.

Held that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank even if it could be described as a channel is not such a channel as had been or could lawfully be used by the public and action cannot be taken under section 133 of the Code of Criminal Procedure for the removal of any obstruction from it.

Jhunnu Singh v. *Mata Autar* (1) and *In re Maharana Shri Jaswatsangji Fatesangji* (2) referred to. *Emperor* v. *Bharosa Pathak* (3) and *Zaffer Nawab* v. *Emperor* (4) distinguished.

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* Criminal Revision No. 1088 of 1913 from an order of Suraj Nath Singh, Magistrate, first class of Deoria, dated the 27th of October, 1913.

(1) Weekly Notes 1906, p. 190. (3) (1912) I. L. R., 34 All., 345.
(2) (1897) I. L. R., 22 Bom. 988. (4) (1904) I. L. R., 32 Calc., 980.

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JAGARNATH SAHU v PARMESHWAR NARAIN

THE facts of this case were as follows —

The complainant filed a complaint in the magistrate's court to the effect that the rain water of the village Deokali, in which the complainant lived, used to flow through a field No 35 to the accused's village Jaraso and there collect in a ditch No 40 belonging to the accused, that the accused has deepened the ditch, taking out earth from it and throwing it on to the Deokali side so as to block the passage of rain water, that this obstruction has caused damage to the fields in Deokali, especially the complainant's field No 53 On these facts he prayed for removal of the obstruction The accused denied that field No 35 was ever used as a channel or that he ever obstructed the water from flowing in its channel The Magistrate took evidence on both sides and came to the conclusion that the water of Deokali used to pass through the channel marked D in the map as well as through field No 35, and ordered the alleged obstruction to be removed

Mr *D R Sawhny* for the applicant contended that the Magistrate had no jurisdiction to pass the order that he did, inasmuch as the case was not one of a public nuisance The matter was really one for the Civil Court to decide the dispute being a private dispute The public were not interested in the matter at all *In re Maharana Shri Jaswatsangji Fatesangji* (1), *Jhunnu Singh* v *Mata Autar* (2) The case of *Emperor* v *Bharosa Pathak* (3) was wrongly decided

Mr *J Simeon* for the opposite party, contended that the obstruction was a cause of damage to the whole village Deokali and thus the obstruction was one in which the public were interested Section 133 of the Code of Criminal Procedure was therefore applicable He relied on *Emperor* v *Bharosa Pathak* (3) and *Zaffer Nawab* v *Emperor* (4)

RYVES and PIGGOTT JJ —This is an application in revision to set aside an order purporting to have been passed under section 137 of the Code of Criminal Procedure The facts appear to be as follows The applicant Jagarnath Sahu owns a field No 35 in the village of Jaraso This field is on the extreme northern border of that village It marches with field No 52 and a portion of field No 53 of village Deokali It appears that the level of field

(1) (1897) I L R, 22 Bom 988
(2) Weekly Notes, 1906, p 190
(3) (1912) I L R., 34 All 345
(4) (1904) I. L R., 32 Calc, 930

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JAGARNATH SAHU v. PARMESHWAR NARAIN

No 35 is below that of the surrounding fields, and the result was that the surplus water had flowed in the past over this field into a tank to the south of the field in the village of Jaraso It is said that Jagarnath Sahu has erected a *band* on the north of this tank and has also raised the level of the field No 35 to such an extent that the flood water, instead of flowing into the tank as it used to do is now held back and thus causes injury to the field No 53 of Deokali in particular and also to some of the neighbouring fields An application, purporting to be made under section 133 was filed before the Magistrate by the owner of the field No 53 in Deokali, whereupon the Magistrate issued notice to the other side Jagarnath Sahu showed cause against that order, stating that the field was not a channel to which section 133 could possibly apply The learned Magistrate took evidence in the case on both sides and ultimately passed the order complained of It has been argued on behalf of the applicant that the learned Magistrate had no jurisdiction on the facts of the case, to pass this order Under section 133 he could only take action if he was satisfied that an unlawful obstruction required removal from a channel which is, or may be, lawfully used by the public It seems to us that even if field No 35 could be described as a channel, it is not such a channel as had been or could lawfully be used by the public If injury has been caused by any tortious act done by Jagarnath Sahu, then the persons who have been damnified may have their remedy by civil suits Reliance has been placed on the case of *Emperor* v *Bharosa Pathak* (1) and on *Zaffer Nawab* v *Emperor* (2) The former decision must be taken in conjunction with the particular facts of that case It is not an authority applicable to the present facts The Calcutta case is clearly distinguishable There the public had acquired a right to ford a river at a particular place, and obstruction to this public right was obviously within the purview of section 133 of the Code of Criminal Procedure A case more in point is that of *Jhunnu Singh* v *Mata Autar* (3) See also *In re Maharana Shri Jaswatsangji Fatesangji* (4) In our opinion the learned Magistrate had no jurisdiction to pass the order We therefore set it aside

Order set aside.

(1) (1912) I. L. R., 34 All 345
(2) (1904) I. L. R. 32 Cal. 930
(3) Weekly Notes, 190 , p 190
(4) (1897) I. L. R. 22 Bom., 988.

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February 10

APPELLATE CIVIL.

Before Mr Justice Ryves and Mr Justice Piggott

MUHAMMAD FAKHR UD DIN (APPLICANT) v BHIKHI RAM (OPPOSITE PARTY) *

Act No XLV of 1860 (Indian Penal Code) sections 182 and 211—Sanction to prosecute—Jurisdiction—Application by insolvent to District Judge alleging misappropriation of property of insolvent

A person who had been declared an insolvent and in respect of whose property a receiver had been appointed by the District Judge applied to the court representing that one Bhikhi Ram had misappropriated certain property belonging to him and asking that Bhikhi Ram s house might be searched The District Judge forwarded this application to the Magistrate and Bhikhi Ram was arrested and his house searched Subsequently, however proceedings against Bhikhi Ram were dropped there being no evidence against him

Bhikhi Ram then applied to the District Judge for sanction to prosecute the applicant under sections 182 and 211 of the Indian Penal Code The sanction asked for was granted

Held that as regards section 182 there was no objection to the order, but as regards section 211 the criminal proceedings taken against Bhikhi Ram were not taken in *the Court of the District Judge and it was at any rate doubtful* whether it could be said that the offence committed by the applicant was committed in relation to any proceeding pending in that court

THE facts of this case were as follows —

The appellant was declared an insolvent and a receiver of his property was appointed In the course of the insolvency proceedings the receiver was directed by the court to sell by auction certain property of the insolvent The respondent purchased a considerable quantity of property at the auction sale The appellant presented an application to the District Judge of Cawnpore, in whose court the insolvency proceedings were going on, that the respondent had, with the connivance of the agent of the receiver and under cover of the auction sale, dishonestly removed and appropriated certain goods for the sale of which no order had been passed by the court One of the prayers in the application was that the court might be pleased to order the Police to make a prompt search of the respondent's premises The District Judge sent the application to the Magistrate and asked him to have the search made at once The search was effected,

* First Appeal No 178 of 1913 from an order of Austin Kendall, District Judge of Cawnpore, dated the 4th of August 1913

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and the respondent was arrested and taken before a Magistrate, who released him on bail The police made a local investigation and sent up a report in form B The respondent was thereupon discharged He then applied to the District Judge of Cawnpore for sanction to prosecute the appellant under sections 182 and 211 of the Indian Penal Code The sanction prayed for was granted, hence this appeal

Mr *C C Dillon* (with him Mr *D R Sawhny*) for the appellant —

The District Judge had no jurisdiction to grant the sanction What the appellant prayed the District Judge to do was to order the police to make a search By making this application the appellant cannot be regarded as having instituted or caused to be instituted a criminal proceeding in the court of the District Judge, and, there being no criminal proceeding in his court, he was not competent to grant the sanction for prosecution under section 211 If any criminal proceeding was instituted in any court it was instituted in that of the Joint Magistrate before whom the respondent was placed who granted bail and who subsequently discharged the respondent The only court which could give sanction for prosecution under section 211 was therefore that of the Joint Magistrate The District Judge was not competent to investigate and act upon the charge contained in the application which was made to him Under such circumstances the sanction to prosecute under section 211 was illegal I rely on the principle of the case of the *Empress* v *Jamoona* (1) The District Judge had no jurisdiction himself to order the search prayed for, he could not properly move in the matter He could act merely as the applicant's agent and pass on the complaint to the police, that was all that he did Therefore the false information was given to the police really, and not to the District Judge Accordingly, it was for the police and not for the District Judge to sanction prosecution under section 182 The Judge was not a public servant who in the discharge of his duty as such had jurisdiction to take action in the matter of the charge contained in the application

In the second place the sanction is bad because the appellant has not been given an opportunity of proving his case. The

(1) (1881) I L. R 6 Calc 620

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Joint Magistrate who had released the respondent had taken no evidence in the matter The District Judge too has not taken any evidence and has not found whether the goods were in fact removed, or whether the allegations were made in good faith or bad faith No sanction should be given at this stage

Mr W. *Wallach*, for the respondent —

This appeal should properly have been filed on the criminal side and not as a civil appeal from an order The District Judge was competent to grant the sanction The appellant by his application instituted a criminal proceeding in the court of the District Judge There is no definition in the Code as to what constitutes the institution of a criminal proceeding But there can be no doubt that the laying of any information upon which a man can be taken into custody and is taken into custody amounts to instituting a criminal proceeding, or at any rate, to causing the institution of a criminal proceeding The terms "or causes to be instituted" in section 211 are very wide By making the application to the District Judge the appellant caused a proceeding to be instituted against the respondent in the course of which he was arrested by the Police and taken before a Magistrate As the application which caused the institution of the criminal proceeding, was made in the court of the District Judge that court was the proper court to grant the sanction under section 211 The order of discharge passed by the Joint Magistrate was one merely discharging the security or bail on which he had released the respondent from custody, it was not an order of discharge within the meaning of section 203 of the Code of Criminal Procedure So the Joint Magistrate's Court was not the court competent *to grant the sanction for prosecution under section 211* As to the sanction under section 182, the District Judge was the proper authority to grant it. The question is not whether the District Judge had jurisdiction to do what the application prayed him to do namely, to order the police to make a search The point is that the appellant asked the District Judge as a public officer to do this, he intended the Judge to act in this way The District Judge did what he was asked by the petition to do The appellant did not ask the police to do anything

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The proper authority to grant the sanction under section 182 was therefore, the District Judge and not the police

Then, as to whether the sanction should have been granted at this stage A sufficient *primâ facie* case has been made out that the charge contained in the application was false The District Judge by requesting the police to make the search gave the best possible opportunity to the appellant to prove his case Moreover, the Joint Magistrate discharged the respondent, the police sent in a report in Form B The order granting the sanction is, under the circumstances, a proper order

Mr *C C Dillon* replied

RYVES and PIGGOTT JJ —This proceeding, though registered as a First Appeal from an Order of a Civil Court is in reality an application to this Court to exercise its powers under clause 6 of section 195 of the Code of Criminal Procedure to revoke a sanction which has been given by the District Judge of Cawnpore for the prosecution of one Haji Hafiz Muhammad Fakhruddin on charges under sections 182 and 211 of the Indian Penal Code The said Haji Hafiz Muhammad Fakhruddin had been declared insolvent in the court of the District Judge of Cawnpore and proceedings against him were pending He presented on the 4th of June 1913 a written petition to the District Judge of Cawnpore in which he alleged in effect that one Bhikhi Ram had, under cover of proceedings which were being taken by the Receiver appointed under orders of the Court and in collusion with a subordinate agent of the Receiver and with another person, dishonestly taken possession of certain property to wit a large number of steel bars, and appropriated it to his own use, knowing that he had no right to do so The petition asked the District Judge to take action in various ways one of these ways being by procuring a police search of Bhikhi Ram s premises This petition was forwarded by the District Judge to the Magistrate with a request that immediate action might be taken by the police The result was that Bhikhi Ram was arrested and his house was searched He was placed before a Magistrate but released on bail Eventually the investigating police officer reported that there was no sufficient evidence to warrant further proceedings being taken against Bhikhi Ram and the Magistrate discharged

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his security It is under these circumstances that on the application of Bhikhi Ram the District Judge of Cawnpore has sanctioned the prosecution of Haji Hafiz Muhammad Fakhruddin for offences under sections 182 and 211 as aforesaid The objection taken before us is that the sanction given is bad in law and not warranted by the circumstances of the case So far as it concerns the alleged offence under section 182 of the Indian Penal Code we are satisfied that Mr Kendall, the District Judge of Cawnpore was a public servant to whom the alleged false information was given and that he had before him materials sufficient to warrant his granting sanction to the institution of proceedings under that section With regard to the alleged commission of an offence punishable under section 211 of the Indian Penal Code our position is this —We think that criminal proceedings were instituted against Bhikhi Ram within the meaning of that section, but looking to the words of section 195 of the Code of Criminal Procedure, we are quite clear that the court of the District Judge of Cawnpore was not the court in which these proceedings were instituted and we are at any rate doubtful whether it could be said that this offence of causing to be instituted criminal proceedings without just or lawful ground was committed in relation to a proceeding pending in the court of the District Judge The record of the police investigation and the orders of the Magistrate thereon have not been before us Consequently we think it better that we should refrain from expressing any opinion one way or the other as to whether the sanction of the Magistrate who directed the release of Bhikhi Ram on bail and eventually discharged his security may not be required before proceedings under the section are taken against Haji Hafiz Muhammad Fakhruddin At the same time however to avoid the possibility of any technical objection that might be raised hereafter as to the necessity for the District Judge s sanction we think it advisable to leave the Judge s order as it stands The result is that we dismiss this appeal with costs including in this Court the fees paid by the respondent to the amount certified in this Court

Appeal dismissed

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

1914
February, 17.

HERBERT ARCHIBALD POCOCK AND ANOTHER (PLAINTIFFS) *v* THE DELHI AND LONDON BANK, LIMITED MUSSOORIE, AND OTHERS (DEFENDANTS) *

Will—Executor—Powers of executor in dealing with the estate of his testator

One P died leaving a will by which he directed that certain legacies should be paid out of a fund of Rs 10 000 invested in fixed deposit in the Delhi and London Bank. The Bank had during P s life time advanced certain sums to his daughter on an undertaking by P that he would stand surety for the loan P was also himself indebted to the Bank

Held on suit by the legatees that the executor of P s will was perfectly justified, on being satisfied as to the fact of P s relations with the Bank above described, in permitting the Bank to realize from the fund in question both the amount of the loan to P s daughter and the amount of his own indebtedness

THE facts of this case were as follows —

A Mr George Pocock made his will on the 4th of October, 1909 In this will he referred to the fact that he had a fixed deposit in the Delhi and London Bank, Limited, Mussoorie Branch, of about Rs 10,000 He proceeded to give certain legacies out of that fund. The said George Pocock died on the 15th of November, 1909, and his will was duly proved by the defendant, Mr Bodycot, who was the executor named. The Bank alleged that during his life-time, namely, some time in the year 1906, the Bank advanced to a Mrs Taylor, a daughter of the deceased, the sum of Rs 4,000, at the request of Mr Pocock, the testator, and that he had agreed that the deposit should be security to the Bank for the advance The executor went into this matter and came to the conclusion that the representation of the Bank was true The Bank had in their hands a letter which Mr Pocock had received from the Lucknow Branch of the Bank asking him whether he would give security for the advance to his daughter This letter was handed over to the Manager of the Bank at the time when Mr Pocock is alleged to have agreed to be surety for the loan to his daughter and that the deposit should be security Having satisfied himself on this matter the executor allowed the Bank to deduct the amount due for the advance to Mrs Taylor and all other sums due by the deceased himself and received the balance of the deposit

*First Appeal No. 426 of 1912 from a decree of C H. B Kendall, Subordinate Judge of Dehra Dun dated the 3rd of September 1912

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HERBERT ARCHIBALD POCOCK v THE DELHI AND LONDON BANK LIMITED MUSSOORIE

The legatees sued to recover the amounts bequeathed to them. Their suit was dismissed by the court of first instance and they thereupon appealed to the High Court

Mr *Nihal Chand* for the appellants

Mr *B E O Conor* for the respondents

RICHARDS C J and BANERJI J —The facts connected with the present appeal are shortly as follows A Mr George Pocock made his will on the 4th of October, 1909 In this will he referred to the fact that he had a fixed deposit in the Delhi and London Bank Limited Mussoorie Branch of about Rs 10 000 He proceeded to give certain legacies out of that fund The said George Pocock died on the 15th of November 1909 and his will was duly proved by the defendant Mr Bodycot who was the executor named The Bank alleged that during his life-time namely some time in the year 1906 the Bank advanced to a Mrs Taylor, a daughter of the deceased the sum of Rs 4 000 at the request of Mr Pocock the testator and that he had agreed that the deposit should be security to the Bank for the advance The executor went into this matter and came to the conclusion that the representation of the Bank was true There can be very little doubt that the executor was justified in the conclusion to which he came The Bank had in their hands a letter which Mr Pocock had received from the Lucknow Branch of the Bank asking him whether he would give security for the advance to his daughter This letter was handed over to the Manager of the Bank at the time when Mr Pocock is alleged to have agreed to be surety for the loan to his daughter and that the deposit should be security Having satisfied himself on this matter, the executor allowed the Bank to deduct the amount due for the advance to Mrs. Taylor and all other sums due by the deceased himself and received the balance of the deposit The executor says that he did this with the assent of the legatees themselves There can be no doubt that they did assent to this course but it is possible that they thought that they were reserving to themselves the right to take any further proceedings they thought fit against the Bank It is somewhat difficult to see how the present suit could be maintained by the legatees against the Bank The Bank was entitled to look to the executor and to settle all questions with the

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executor, so long as there was no fraud In the present case however, the plaintiffs who are some of the legatees of the deceased Mr Pocock, have made not only the Bank but also the executor parties to the suit and it is contended on their behalf that the settlement made by the executor with the Bank was equivalent to the payment of an invalid claim and that, accordingly, not only the executor but the Bank also are liable for the amount It is contended that it was impossible to create a lien on the deposit save by writing under the hand of the deceased and that inasmuch as Mrs Taylor's debt was more than three years old the Bank could not have sued her, and therefore could not have sued the executor as representing the estate of the deceased and that on these grounds the claim of the Bank was an invalid claim' In our opinion the power of executors acting *bonâ fide* to settle claims in respect of the estate of their testator cannot be disputed There is certainly no evidence to show that Mrs Taylor's debt had become time barred, on the contrary having regard to the practice of banks, it is much more probable that the debt was still in force against her The reason why neither the Bank nor the executor thought fit to proceed against her is because she was not considered a mark' for the amount It is not suggested, and could not be suggested, that the executor did not act perfectly *bonâ fide* in his dealing with the Bank We think it quite unnecessary to decide the question whether what occurred between the deceased and the Manager of the Bank at Mussoorie was sufficient to create in law a valid lien on the deposit, because in our opinion under the circumstances of the present case the executor was quite justified in settling with the Bank in the way he did, that is to say, allowing the Bank to deduct the amount of the deceased's own debt and the moneys advanced to his daughter, Mrs Taylor, for which he had at least, become surety they taking over the balance of the money We think in all probability this was not only the honest course but it was the wisest course that the executor could have adopted. The appeal accordingly fails and is dismissed with costs

Appeal dismissed

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February, 20

Before Sir Henry Richards Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

RAJWANTA KUNWAR (PLAINTIFF) *v* SHIAM NARAIN SINGH AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908) section 34, order XXXIV, rules 2 and 4—Mortgage—Preliminary decree on mortgage—Interest—Discretion of Court

Unless for some legal reason it sees fit to interfere with the contract as to the rate of interest, a court passing a preliminary decree in a mortgage suit under order XXXIV, rule 2 of the Code of Civil Procedure (1908) has no power to award interest at other than the contractual rate up to the date fixed for payment

THIS was a suit for sale on a mortgage bond carrying interest at the rate of 2 per cent per mensem with yearly rests The defence, *inter alia*, was that the rate of interest was penal The lower court held that the rate of interest, though high, was not penal, but allowed interest at the rate of 6 per cent per annum only from the date of the institution of the suit to the date fixed for payment

Maulvi *Muhammad Ishaq*, for the appellant, submitted that the mortgagee was entitled to interest at the contractual rate from the date of the institution of the suit up to date fixed for payment of the mortgage money and to a reasonable rate of interest from that date up to the date of realization He relied on order XXXIV, rules 4 and 2, of the Code of Civil Procedure, 1908, and also on the following cases *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (1), *Maharaja of Bhartpur* v. *Rani Kanno Dei* (2) and *Bakar Sajjad* v. *Udit Narain Singh* (3)

The respondents were not represented

RICHARDS, C J, and BANERJI, J —This appeal arises out of a suit on foot of a mortgage, dated the 6th of July, 1904 The principal money secured by the mortgage was the sum of Rs 250 The present claim is for Rs 1 068 13 8 The court below granted a decree for sale and awarded the plaintiff interest at the rate of 6 per cent per annum from the date of the institution of the suit to the date fixed for payment and awarded no interest after that date The plaintiff has appealed on the question of the interest

* First Appeal No 427 of 1912 from a decree of B J Dalal District Judge of Azamgarh, dated the 4th of June, 1912

(1) (1898) I L R 26 Calc, 39 (45) (2) (1900) I L R, 23 All, 181.

(3) (1899) I L R, 21 All, 361.

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RAJWANTA KUNWAR v SHIAM NARAIN SINGH

allowed The other side does not appear The rate of interest was high, and if we thought that the court below had any discretion in the matter we doubt that we would have interfered with its exercise of it. It is contended however on behalf of the appellant, that the court below had no discretion in the matter Order XXXIV, rule 4 provides that in a suit for sale if the plaintiff succeeds the court shall pass a decree to the effect mentioned in clauses (a) (b) and (c) of rule 2 The material part of rule 2 is that the court should pass a decree (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on the day next thereinafter mentioned, and (b) declaring the amount so due at the date of such decree The date referred to in the rule is the date which the court fixes for the payment of the money by the defendant to the plaintiff It seems to us that the clear meaning of the rule is that the court must ascertain the amount due on the mortgage up to the date mentioned That amount must be according to the contract between the parties (unless the court for some legal reason sees fit to interfere with the contract as to the rate of interest) The only section of the Civil Procedure Code which gives any discretion in the matter of interest to the court is section 34 This section applies to decrees for the payment of money, and in our opinion does not in any way permit the court to reduce the interest below the contractual rate when it is taking the accounts and making the decree provided for by order XXXIV The result is that we allow the appeal to this extent that we vary the decree of the court below by awarding interest at the contract rate from the time of the institution of the suit to the time fixed for payment of the mortgage money We extend the time to six months from this date We allow no interest after that time the matter being entirely in the discretion of the court We make no order as to costs

Decree modified

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February 6.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR *v.* HAIDAR RAZA.*

Act No. I of 1872 (Indian Evidence Act), section 91—Evidence—Confession—Admission of guilt during departmental inquiry—Oral evidence as to statement admissible.

The complainant in a petty criminal case before a bench of honorary magistrates, in the course of negotiations concerning a compromise, made a statement to the effect that he had paid a certain sum of money by way of an illegal gratification to the peshkar of the court. The peshkar was at once called up and examined by way of departmental inquiry and not on oath, and he admitted having received money from the complainant. The honorary magistrates reported the circumstances to the District Magistrate who directed the prosecution of the peshkar.

Held that the statement made by the peshkar to the magistrates was not a statement which was required by law to be in writing and could be proved by the evidence of either of the magistrates who had heard it.

THE facts of this case were as follows:—

One Haidar Raza was a reader of the court of the honorary magistrates of Gorakhpur. The case of Sukhari against Baqar was pending in that court. It was a petty case of assault, and the magistrates suggested the parties to compromise. The parties went out of court and did not return for a long time. The magistrates sent for them, and on inquiry Sukhari told them that *he was ready to compromise,* provided the other side paid him all his expenses, which amounted to about Rs. 9, seven of which were paid to their peshkar. Sukhari was put into the witness box and was examined on oath and he made a statement which was recorded. The magistrates sent for the accused, who according to a note made by them on the 26th of June, 1913, "admitted having received Rs. 5 from him (complainant)." This statement was made in vernacular, but the honorary magistrates (Messrs. Mackinnon and Gur Sewak Upadhya) recorded it in English. They then sent the file to the District Magistrate, who ordered the peshkar to be prosecuted. Mr. Gur Sewak was examined as a witness, and he stated that the statement recorded was the full and correct statement of what the accused said and that the statement "was quite voluntary. It was not made owing to any inducement,

* Criminal Revision No. 1223 of 1913 from an order of W. R. G. Moir, Sessions Judge of Gorakhpur, dated the 17th of November, 1913.

threat or promise" The Magistrate convicted the accused On appeal the Sessions Judge held that the confession, not having been recorded as required by law, was not admissible in evidence, but on the evidence he held the guilt to be proved The following quotation from his judgement is material —

"The question is whether the terms of section 533, Criminal Procedure Code, enable the court to admit in evidence the record of the statement of appellant made by the honorary magistrate" The answer to that question depends on whether that statement was recorded or purported to be recorded under section 164 or 364, Criminal Procedure Code, and was duly made It did not purport to be recorded under either of these sections No attempt was made by the honorary magistrate to comply with the provisions of the law regarding the record of statements of confessions of accused persons The statement can only be said to have been recorded under section 164 in that it was a statement made to a bench of magistrates in the course of an investigation and was recorded by them Learned pleaders for appellant have cited 17 Calc 862, 9 Mad., 224, 1 Bom, 219 and 2 C W. N, 702, (714) The Bombay case was under the Act of 1872 It does not touch the question, how far defects in the manner of recording a statement may be cured In the Madras case it was laid down that the provisions of section 533 of the Act of 1882, then in force, would not render a confession admissible where no attempt has been made to conform to the provisions of section 164, Criminal Procedure Code 17 Calc, 862, has been dissented from in 18 Calc, 549, and in 22 Calc, 817, and in 21 Bom, 495 These rulings were under the Code of 1882 Section 533 of the Code of 1898 now in force has wider terms But it seems to me that it would do violence to the terms of the section to hold that though the statement of appellant did not purport to be recorded under section 164 or 364 Criminal Procedure Code, it was in fact recorded under either of these sections

I hold that the statement of appellant was not recorded and did not purport to be recorded under section 164 or 364, Criminal Procedure Code The defect cannot be cured by section 533, Criminal Procedure Code The record of appellant's statement is not admissible in evidence No other evidence of his

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EMPEROR v. HAIDAR RAZA

confession is admissible Hence his confession cannot be proved"

The accused applied in revision to the High Court

Mr *E A Howard* for the applicant

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

PIGGOTT, J —This is an application in revision against an order by the Sessions Judge of Gorakhpur dismissing the appeal of one Saiyid Haidar Raza against his conviction of an offence punishable under section 161 of the Indian Penal Code, before a magistrate of the first class in that district in which he had been sentenced to three months' rigorous imprisonment The following facts are material —On the 26th of June, 1913 a bench of honorary magistrates consisting of two magistrates, sitting at Tamkohi in the Gorakhpur district had before it a petty criminal case in which one Sukhari was the complainant The magistrates were informed that the parties were inclined to compromise, and as the offence was a compoundable one, they gave the parties an opportunity to discuss matters out of court Later in the day the magistrates were informally told of a difficulty which had arisen in arranging the terms of the compromise and Sukhari made a statement to the effect that he had paid certain money as an illegal gratification to two officials of the court The magistrates administered solemn affirmation to Sukhari and then and there recorded in the English language a brief memorandum of the statement which Sukhari proceeded to make It is not quite clear whether the present applicant Saiyid Haidar Raza, who at the time occupied the position of clerk to the bench of honorary magistrates was present or not while Sukhari s statement on solemn affirmation was being recorded If he was not present while this was being done he must have been called before the magistrates shortly afterwards for it is in evidence that certain further conversation took place between the magistrates Sukhari and Saiyid Haidar Raza A brief note was recorded in the English language by the honorary magistrates regarding the facts thus ascertained That note includes a memorandum of the substance of what was then stated by Saiyid Haidar Raza The magistrates made some further inquiries into the matter, and later on formally recorded a

statement by Saiyid Haidar Raza in the course of which he denied all the allegations against him This was recorded on the 20th of September, 1913, and is obviously in the form of an explanation offered by an official against whom proceedings are being taken departmentally Finally, the honorary magistrates reported the matter to the District Magistrate with a recommendation that Saiyid Haidar Raza should be dismissed but not criminally prosecuted. The District Magistrate however ordered his prosecution, with the result already indicated The question before me is as to the admissibility or otherwise of some of the evidence on the record. The Sessions Judge has ruled that the honorary magistrates were precluded by the provisions of section 91 of the Indian Evidence Act (No I of 1872) from giving oral evidence as to what took place before them on the 26th of June 1913 in so far as that evidence involved the proving of any confession then made by Saiyid Haidar Raza I am perhaps not quite clear regarding the view taken by the learned Sessions Judge of the record made on that day of Sukhari s statement on solemn affirmation The result at any rate has been this that the Sessions Judge has ruled out the oral evidence of the confession alleged to have been made by the applicant on the 26th of June 1913 but has convicted him upon the oral evidence as to something which was stated by Sukhari in his presence and as to his own conduct when Sukhari made this statement The point taken in revision is that the evidence thus accepted does not warrant the conviction of the applicant in respect of the offence charged I have felt it incumbent on me to deal with he case as a whole and to re-consider the finding recorded by the learned Sessions Judge as to the admissibility of the oral evidence given by the honorary magistrates regarding Saiyid Haidar Raza s confession The Sessions Judge has held that any statement which Saiyid Haidar Raza may have made to the honorary magistrates on the 26th of June 1913 if of the nature of a confession would be a matter which the said honorary magistrates were required by law namely by section 164 of the Code of Criminal Procedure to reduce to writing in a particular way If this view is correct, it would certainly follow that the rough note or memorandum recorded by the honorary magistrates in which Saiyid Haidar Raza s confession is embodied would not

be a proper record of his confession and could not be accepted in evidence It would also follow that oral evidence of the substance of this document would be excluded by section 91 of the Indian Evidence Act Now the original statement made by Sukhari to the honorary magistrates, by which their attention was first drawn to the commission of an offence punishable under section 161 of the Indian Penal Code, was certainly not a "complaint" within the meaning of the definition given in section 4 of the Criminal Procedure Code It is clear to me that Sukhari had no intention of asking the Magistrates to take action under the Criminal Procedure Code When he made that statement, he was merely explaining to them why he was holding out for certain terms before he could consent to compound the offence in the case in which he appeared as complainant If, therefore, the honorary magistrates proceeded to take cognizance of this offence, they could only do so under section 190 clause 1 (*c*) The learned Sessions Judge's view of the proceedings which followed seems either to be coloured by the assumption that the honorary magistrates, being empowered by law to take cognizance of the matter under the clause aforesaid, were legally bound to do so, and to do so immediately, or else to rest on the supposition that their examination of Sukhari on solemn affirmation shows that they had so taken cognizance I am not prepared to admit either of these propositions A magistrate is also a citizen and is also the head of an office Matters may come to his notice in either of these capacities regarding which he may consider it advisable to question other people, without its being necessarily presumed that he was acting in his magisterial capacity From any point of view the examination of Sukhari on solemn affirmation was a mistake Sukhari's statement is itself a confession, that he had been guilty of offences punishable under section $\frac{161}{107}$ of the Indian Penal Code If it was to be recorded at all by the magistrates as such, it should have been recorded in the manner provided for confessions and not as a deposition on solemn affirmation As a matter of fact the proceedings of the honorary magistrates read as a whole show clearly that they conceived themselves to be conducting a departmental inquiry into the allegations of misconduct suddenly made to them against certain of their

subordinates I have conducted inquiries of a very similar nature myself, and it certainly never occurred to me that, in questioning any one of my subordinates against whom allegations of misconduct had been made I was bound to act in my magisterial capacity and could only record any statement which they might see fit to make subject to the formalities and safeguards prescribed by law, i. e by section 164 of the Code of Criminal Procedure In my opinion the statements made by Saiyid Haidar Raza to the honorary magistrates, when he was called into their presence and confronted with Sukhari on the 26th of June, 1913 were not matters required by law to be reduced to the form of a document Consequently section 91 of the Indian Evidence Act has no application The honorary magistrates have been examined in the courts below and have proved what took place before them on the date abovementioned and what Saiyid Haidar Raza stated when the matter was unexpectedly sprung upon him. I have considered the evidence and I see no reason to doubt that the applicant was surprised into the making of true admissions against himself and that the oral evidence on which the first court based its conviction of the applicant was reliable as well as legally admissible I have considered the provisions of section 24 of the Indian Evidence Act, and am satisfied that they do not apply to the circumstances of this case The result is that I dismiss this application.

Application dismissed

REVISIONAL CRIMINAL

1914 *January*, 14

Before Mr Justice Piggott

EMPEROR v HAZARI LAL.*

Act (Local) No I of 1900 (United Provinces Municipalities Act) sections 147, 152—Notice—Disobedience to lawfully issued notice—Competence of accused to challenge validity of notice

Held that section 152 of the United Provinces Municipalities Act 1900, does not prevent a person who may be prosecuted for disobedience to a notice issued by a municipal board from establishing the defence that the notice in question was not as a matter of fact the board's notice inasmuch as it was not signed by any one legally authorized to sign such notices on behalf of the board

* Criminal Revision No 1227 of 1913 from an order of E L Norton, Magistrate, first class, of Allahabad dated the 2nd of December 1913

1914

EMPEROR v HAZARI LAL

THE applicant, Hazari Lal was prosecuted under section 147 of the North Western Provinces and Oudh Municipalities Act for having disobeyed a "written notice lawfully issued by the Municipal Board of Allahabad on 24th of August 1913 requiring the demolition within ten days of a certain *toria* (stone bracket or balcony support) constructed by him without previous sanction of the board At the trial, one of the defences set up by Hazari Lal was that he was not bound to comply with the notice inasmuch as it was not a notice lawfully issued by the Municipal Board The Magistrate was of opinion that if Hazari Lal wanted to take exception to the notice on any ground he should have appealed against it under section 152 of the Municipalities Act, to the Commissioner, and following the ruling in I L R, 26 All, 386 he held that as Hazari Lal had preferred no such appeal, the validity of the notice could not be questioned by him at the trial The Magistrate convicted him and sentenced him to a fine of Rs 40 Hazari Lal applied to the High Court in revision

Munshi *Purushottam Das Tandan* for the applicant —

The prosecution had to prove that the notice was lawfully issued by the Municipal Board The notice was signed by M A Baqi Khan, a member of the board Under the bye-laws of the Allahabad Municipality notices under section 87 of the Act could be issued lawfully on behalf of the board only by the senior vice chairman and the member in charge of conservancy jointly M A Baqi Khan was neither of these two office bearers He had no authority to issue the notice, the notice issued by him was not a lawful notice issued by the municipal board Hazari Lal was entitled to raise this defence at the trial Section 152 of the Act says that where there is a lawfully issued notice that notice cannot be called in question except by way of appeal to the Commissioner The case of *Emperor* v *Shadi* (1) which is relied on by the Magistrate does not go beyond this Here the question is not whether a lawfully issued notice is or is not justified by the circumstances of the case, the plea taken is that there is no lawfully issued notice at all The ruling cited has no application to such a case

(1) (1904) I L R 26 All, 386

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown —

The bye laws do not lay down that the notices are to be signed and sealed by both the senior vice chairman and the member in charge of conservancy The signature of one of them may be sufficient if the notice is in fact authorized by both of them The senior vice-chairman had inspected the locality and there is nothing to show that the notice was not authorized by him Lala Bisheswar Das was the member in charge of conservancy he had arranged with M A Baqi Khan to perform his duties for a short period

Munshi *Purushottam Das Tandan* in reply —

These facts have not at all been proved or gone into The prosecution should have proved fully that the notice was a lawful notice

PIGGOTT, J —Hazari Lal a resident of Allahabad has been convicted of disobeying a written notice lawfully issued by the Municipal Board of Allahabad under the powers conferred upon it by the United Provinces Municipalities Act of 1900 He comes to this Court in revision and the one substantial point raised by him is that the prosecution has not proved that the notice which he is alleged to have disobeyed was a notice lawfully issued by the Municipal Board of Allahabad under the powers conferred upon it If this were a point taken for the first time in revision I am not certain that I should have considered it my duty to go into it I find however, that this defence was in substance taken before the court below and that the trying Magistrate refused to entertain it The Magistrate was of opinion that if he had entered into this defence he would be permitting the accused before him to contravene the provisions of section 152 of the Municipalities Act That section however applies to a notice issued by the board and the point taken in the present case is that the accused had received no notice issued by the board under the powers conferred upon it by the Act The paper which was served upon Hazari Lal on the 28th of August 1913 contained a direction with which he admittedly failed to comply within the period prescribed by it It did not purport on the face of it to be a notice issued by, or by order of the Municipal Board but on behalf of the

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EMPEROR v. HAZARI LAL

member in charge of ward no 4, and it was signed by a single member of the board The notice was one covered by the provisions of clause 5 of section 87 of the Municipalities Act, that is to say it was a notice such as the Municipal Board was empowered to issue under the abovementioned provision of the law The only question, therefore, was whether the board had issued this notice or not The powers conferred upon the Municipal Board by this section are important, and the legislature found it necessary by the Amending Act No I of 1907, to make special provision for the circumstances under which alone these powers could be delegated I think the accused in this case was entitled to set up the defence that the paper served upon him was not a notice issued by the Board or by the authority of any person to whom the powers exercisable by the Board as a whole had been lawfully delegated The defence having been set up the Magistrate ought to have inquired into it and called upon the prosecution to produce evidence sufficient to satisfy him on this point. I therefore, set aside the conviction and sentence in the case and return the record to the court below with the following directions The Magistrate will take up the case at the point at which it stood when the accused entered his defence and will require the prosecution to produce evidence to satisfy him, if possible that the notice served upon Hazari Lal on the 28th of August 1913 was a notice issued by the authority of the Board or by the authority of persons to whom the powers of the Board under section 87, clause 5, of the Municipalities Act of 1900 had been lawfully delegated

Conviction set aside.

APPELLATE CIVIL.

1914
February 17

Before Mr Justice Ryves and Mr Justice Piggott.

ABDUL RAHIM KHAN (PETITIONER) v AHMAD KHAN (OPPOSITE PARTY)*

Act (Local)—1901—III (United Provinces Land Revenue Act) section 32 (d)—Mahal—Land held revenue free by the Government not of necessity excluded from the mahal

Held (1) that section 32 clause (d) of the United Provinces Land Revenue Act, 1901, shows that there may be in a mahal persons holding land revenue free, and the land so held yet forms part of the mahal, and (2) that a finding as to whether such land does or does not form part of the mahal is not a pure finding of fact but a mixed finding of fact and law

THE facts of this case were as follows —

In the course of litigation arising out of certain partition proceedings between the parties an issue was framed as to whether a certain plot of land did or did not form part of the mahal Raipur, of village Raipur This plot numbered 301 and forming part of the *abadi* land, originally formed part of mahal Raipur It appeared that the Government acquired the plot and a police outpost was built on it Thereupon the Government was entered in the village papers as constituting one of the proprietors of the mahal, and the plot was entered as "revenue free" Some time later the police outpost apparently ceased to exist, and in 1876 the Government sold the plot to the parties in equal shares The sale deed purported to convey to the purchasers the same rights which the Government had in the land Since then the plot was entered as owned and held revenue free by the parties in equal shares On the issue whether the plot now formed part of the mahal the Munsif found in the affirmative On appeal, the District Judge was of opinion that "the Government, when it was owner of the plot, held it revenue-free, in other words the plot became Government property and it ceased to be a part of mahal Raipur" He reversed the finding of the Munsif and remanded the case An appeal was filed in the High Court against this order of remand

Mr *B E O'Conor* (with him Mr *Nihal Chand*) for the appellant —

The Government had acquired the plot as a part of mahal Raipur, and when the Government sold it, it reverted as a part of

* First Appeal No 194 of 1913 from an order of E M Nanavatti District Judge of Saharanpur, dated the 21st of July, 1913

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ABDUL RAHIM KHAN v AHMAD KHAN

that mahal, its character or nature could not be changed. The fact that the plot became revenue-free is no reason why it should cease to form part of a mahal Revenue free land can form part of a mahal Section 32, clause (d) of the Land Revenue Act As a result of the purchase from the Government the plot may be held by the parties separately from the other proprietors of the mahal, but the plot does not thereby cease to be part of the mahal Separate specific plots may form part of a mahal

Maulvi *Muhammad Ishaq* (with him The Hon'ble Dr *Sundar Lal*) for the respondent —

The finding of the District Judge that the plot is not part of the mahal is a finding of fact and should not be upset Then, sections 141 and 142 of the Land Revenue Act lay down two characteristic features of a mahal namely that every portion of a mahal is liable for the revenue of the whole mahal and that every proprietor of a mahal is responsible to the Government for that revenue When the Government became the owner of the plot and it became revenue free could it then be held liable for the revenue of the mahal and could the Government be held responsible to itself? The entire constitution of that portion of land was changed when the Government acquired it It ceased to be a part of the mahal The acquisition by the Government and the subsequent sale by it of all rights which it had in the land altogether changed the characteristic nature of that land It became not only revenue free but free from the liability to be assessed to revenue at any time in the future It thus ceased to be a part of a mahal

Mr *B E O Conor* was not heard in reply

RYVES and PIGGOTT JJ —This case was remanded by this Court for a decision of the issue as to whether the land in dispute formed part of the mahal Raipur The learned Munsif, on the evidence before him came to the conclusion that it did He found on the evidence of the patwari that the plot in question was entered in the record of rights as a part of the *abadi* and that it had a particular number in the Khasra It also found that the Government had other portions of land in the same mahal On appeal the learned Judge says — ' It is obvious that the Government, when it was owner of the plot held it revenue-free In other words this

plot became Government property and it ceased to be a part of mahal Raipur " It has been argued that this is a finding of fact which is binding on us In our opinion it is not a finding of fact, but is a mixed finding of fact and law We think that the learned Judge is not right in saying that the fact that the Government was owner of this plot at one time and held it revenue free is the same thing as that the property ceased to be a part of the mahal Section 32 clause *(d)*, of the Land Revenue Act shows that there may be in the mahal persons holding land revenue free and the land so held yet forms part of the mahal In our opinion the finding of the District Judge is vitiated by his erroneous view of law We allow this appeal, set aside the order of the learned District Judge and restore the decree of the court of first instance with costs in all courts

Appeal allowed

REVISIONAL CRIMINAL

1914
February, 20

Before Mr Justice Pyves and Mr Justice Piggott

SAYEDA KHATUN v LAL SINGH AND OTHERS *

Criminal Procedure Code sections 145 and 435—Revision—Jurisdiction—Powers of High Court

Held that the High Court has no power to interfere in revision with an order passed by a Magistrate under section 145 of the Code of Criminal Procedure *Jhingai Singh* v *Ram Partap* (1) and *Maharaj Tewari* v *Har Charan Rai* (2) followed

THE facts of this case were as follows —

The applicant sued to eject the opposite party or their predecessors in title The Revenue Court decreed the suit and they were ejected. They wrongfully resumed possession, they were sued in the Civil Court and were again ejected in execution of that court's decree They again usurped the field and a suit was again brought in the Civil Court for possession of the land along with the crops that might be standing on it The suit was decreed on the 12th of June 1913 On an application for execution of this decree an order was passed on the 13th of August, 1913 directing the amin

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*Criminal Revision No 47 of 1914 from an order of [illegible] Prasad, Magistrate, first class of Moradabad dated the 13th of November 1913

(1) (1909) I L R 31 All, 160   (2) (1903) I L R 26 All 144

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SAYEDA KHATUN v LAL SINGH

to put the applicant in possession of the land and also on failure of the judgement debtors to remove the standing crops, of those crops On the next day the amin executed this order and reported that, as the judgement debtors had not appeared to remove the crops, possession over the crops as well had been given to the decree holder by beat of drum Shortly after this proceedings under section 145 of the Code of Criminal Procedure were taken against the parties in respect of these standing crops, and the Magistrate coming to the conclusion that possession was with the opposite party maintained them in possession by his order dated the 19th of November, 1913 Hence this application in revision, which coming up before Tudball, J was referred by him to a Bench of two Judges

Babu *Sarat Chandra Chaudhri*, for the applicant —

The rights of the parties have been determined by a competent Civil Court, its decree has awarded to the applicant possession over the land and the standing crops The Magistrate was not competent to go behind the decree, it was his duty to maintain it and give effect to it He acted without jurisdiction in taking proceedings under section 145 calculated to modify or cancel the effect of this decree which was recently passed and in execution of which the amin had given the applicant possession only two or three months ago *Doulat Koer* v *Rameswari Koeri* (1) *Baldeo Bakhsh Singh* v *Raj Ballam Singh* (2), *Kunja Behari Das* v *Khetra Pal Singh* (3) *In the matter of Raja Leelanund Singh* (4) The word dispute' in section 145 means a *bonâ fide* dispute The history of the litigation between the parties shows that now there exists no shadow or semblance of title in the opposite party The dispute or in other words the real or supposed uncertainty of title which existed at one time has now been settled once for all by the Civil Court This places the matter beyond the jurisdiction of section 145 *In the matter of Gobind Chunder Moitra* v *Abdool Sayad* (5) Orders passed under section 145 are of the nature of tentative or interim orders to have effect till the determination of rights by the Civil Court No such orders need or can be passed where the rights have

(1) (1899) I L. R, 26 Calc, 625.
(2) (1903) 2 A L. J., 274.
(3) (1901) I. L. R 29 Calc, 203
(4) (1877) 1 C L. R, 273
(5) (1881) I.L R 6 Calc, 835 (841)

already been determined by the Civil Court How can the Civil Court determine the same rights twice? The action of the Magistrate has rendered the Civil Court decree nugatory The order being passed without jurisdiction can be revised

1914

SAYEDA KHATUN v. LAL SINGH

Mr *D R Sawhny*, for the opposite party —

Proceedings under section 145 are expressly excepted from the operation of section 435 Except on the ground of want of initial jurisdiction such proceedings cannot form the subject of revision by the High Court. The Magistrate was duly empowered to act under Chapter XII of the Code of Criminal Procedure There existed a dispute in fact although it may be that none should have existed in law So the Magistrate had jurisdiction to hold the inquiry and was properly seised of the case The conclusion arrived at by him may or may not be correct but that is no ground for revision The arguments advanced by the applicant were considered in the case of *Jhingai Singh* v *Ram Partap* (1) I rely on that case and also on the case of *Maharaj Tewari* v *Har Charan Rai* (2)

RYVES and PIGGOTT J J —In our opinion this case is covered by an authority of this Court in *Maharaj Tewari* v *Har Charan Rai* (2) This case was followed in *Jhingai Singh* v *Ram Partap* (1) We entirely agree with the view expressed in both these cases We accordingly dismiss this application

Application dismissed

APPELLATE CIVIL.

1914
February, 25

Before Sir Henry Richards, Knight Chief Justice, and Justice Sir Pramada Charan Banerji.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v JAWAHIR LAL (PLAINTIFF)*

Act No IX of 1908 (Indian Limitation Act) section 5—Civil Procedure Code (1908) order XXII rules 4 and 9—Limitation—Parties—Application for substitution of names filed beyond time—Procedure

Section 5 of the Indian Limitation Act 1908 does not apply to an application made under order XXII rule 4, of the Code of Civil Procedure Where, therefore such an application is made after time the suit or appeal must be

* First Appeal No 225 of 1912 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 4th of April, 1912

(1) (1908) I L R 31 All 1 0 (2) (1903) I L R ^ All 144.

1914

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. JAWAHIR LAL

declared to have abated, and the remedy for the plaintiff or appellant is to proceed by application under order XXII, rule 9

THE facts of the case fully appear from the following referring order of PIGGOTT, J

"This is an application in F A No 225 of 1912 in which the Secretary of State for India is appellant and one Hakim Jawahir Lal was impleaded as sole respondent I am informed that the suit itself is of considerable value and the appeal one which must necessarily come before a Bench of two Judges The application before me is one under order XXII, rule 4 of the Code of Civil Procedure According to the affidavit by which it is supported, Hakim Jawahir Lal died on the 18th of April 1913, and it was not until the 12th of December, 1913 that application was made to this Court on behalf of the appellant to bring the legal representatives of the deceased respondent on the record *Primâ facie* therefore the application is beyond time and is barred by article 177 of schedule I to the Indian Limitation Act, No IX of 1908 In the affidavit before me certain reasons are put forward on behalf of the appellant which are said to be sufficient cause for the application in question not having been preferred within the prescribed period of limitation I am not at present considering the sufficiency of these reasons The point taken before me on behalf of the legal representatives of the deceased respondent to whom notice was issued of this application is that I have no jurisdiction to consider at this stage the sufficiency of the reasons put forward on behalf of the appellant, and that I have no option but to reject this application as one barred by time The question is whether section 5 of the Indian Limitation Act No IX of 1908 applies to the present application That section itself, so far as it relates to applications refers only to applications for review of judgement or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force Under section 372A of the former Code of Civil Procedure (Act XIV of 1882) the corresponding section of the Indian Limitation Act of 1877 was made applicable to applications under section 368A of that Code corresponding to order XXII rule 4 of the present Code of Civil Procedure This section 372A of Act XIV of 1882 has been replaced in the present Code of Civil Procedure by order XXII rule 9 But there is an important difference of language By the third sub rule of order XXII, rule 9 the provisions of section 5 of the Indian Limitation Act are directed to apply to applications under sub-rule 2 of the same rule, but are not directed to apply to any other rule in order XXII, as for instance to rule 4 of order XXII Moreover the words 'the plaintiff or' at the beginning of sub-rule (2) of rule 9 are new, and suggest a change of policy on the part of the Legislature The effect of these alterations as I understand them, is as follows: The sufficiency of the reasons alleged in the affidavit now before me for not making an application under order XXII rule 4, within the prescribed period of limitation cannot be considered at this stage The present application ought to be dismissed as time barred The appeal in question, F A No 225 of 1912 would then come up for disposal before two Judges and would be declared to abate under the provisions of order XXII, rule 4, sub rule (3) It would then be open to the appellant to come to court with an application under

order XXII rule 9 sub rule (2) showing cause under the provisions of section 5 of the Indian Limitation Act for his having neglected to continue the suit that is to say, to make the necessary application under order XXII, rule 4 of the Code of Civil Procedure within the prescribed period It would then be open to this Court to consider the sufficiency of the reasons put forward and to pass such orders as it might consider proper According to this view of the law the proper order for me to pass to-day would be one dismissing the application now before me On behalf of the appellant however I have been asked to pass some order which would have the effect of bringing the whole matter before the Bench which must deal with the appeal itself If my view of the law is correct it would certainly be expedient that an application like the one now before me should be dealt with by a Bench capable of finally disposing of the appeal An order for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application and though I feel no doubt in my own mind regarding the question of law raised it being a question which was fully threshed out before me in the Judicial Commissioner's Court Oudh I think it expedient that this application should be dealt with by a Bench capable of disposing of the appeal itself My order, therefore is that this application along with the file in F A No 225 of 1912 be laid on an early convenient date before a Bench of two Judges"

Mr *W Wallach*, for the appellant :—

Munshi *Benode Behari* and Pandit *Shiam Krishna Dar*, for the respondent

RICHARDS, C J, and BANERJI J —This is an application under order XXII rule 4, of the Code of Civil Procedure to bring on the record the legal representatives of the deceased respondent The application was made after the expiry of the period of limitation prescribed for such an application A learned Judge of this Court has referred the application to us for disposal he being of opinion that under order XXII rule 4 no application can be entertained unless it is filed within the period of limitation allowed by the Limitation Act that is to say within six months from the date of the decease of the respondent We agree with the view taken by our learned colleague The law seems to have been altered in this respect in the present Code of Civil Procedure By section 5 of the Limitation Act that section can apply only to cases to which besides the cases mentioned in the section itself it is made applicable by any other provision of law That section is not made applicable to an application under rule 4 of order XXII The rule distinctly provides in sub rule (3) that where within the time limited by law no application is

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL v JAWAHIR LAL

made under sub rule (1), the suit shall abate as against the deceased defendant In the case of an appeal the word "appeal" should read for "suit" and "respondent" for "defendant" Therefore, as the law now stands, since no application was made under sub rule (1) within the time allowed by law, the appeal must abate The remedy of the person who could not make his application within the time allowed by the law of limitation is that provided by rule 9 of the order He may, after the order of abatement has been passed, apply to have it set aside on the ground that he was prevented by any sufficient cause from continuing the suit or appeal, as the case may be, and this rule clearly makes section 5 of the Limitation Act applicable to it We are of opinion that the application to bring the heirs of the respondent on the record cannot be entertained, having been made beyond the period of limitation prescribed for such an application We accordingly reject it with costs

The appeal was then taken up and the following judgement was delivered.

RICHARDS, C J and BANERJI, J —As no application was made in this case to bring on the record the legal representatives of the deceased respondent within the six months prescribed by the Limitation Act this appeal has abated We accordingly declare that the appeal has abated This order is made without prejudice to any application which the appellant may be advised to make under order XXII, rule 9, of the Code

Appeal abated.

MISCELLANEOUS CRIMINAL.

1914
February, 4

Before Justice Sir George Knox

EMPEROR *v* JAGGAN AND ANOTHER.*

Criminal Procedure Code, section 526—Transfer—Grounds upon which an order for transfer should be made

Held on a construction of section 526 of the Code of Criminal Procedure that the law does not intend that a transfer of a case should be ordered simply because an accused person thinks that he would not get an impartial trial, but the real question to be considered is whether on the facts disclosed in the application for transfer there arises a reasonable inference that the Magistrate who is seised of the case may be prejudiced wittingly or unwittingly against the accused *Sumeshwar* v *King-Emperor* (1); *The Empress* v *Nobo Gopal Bose* (2), *Farzand Ali* v *Hanuman Prasad* (3), *Dupeyron* v *Driver* (4), *Serjeant* v *Dale* (5), *Leeson* v *General Council of Medical Education and Registration* (6), *Queen* v *Meyer* (7) *Queen* v *Handsley* (8) *Allinson* v *General Council of Medical Education and Registration* (9) *The Queen* v *Allan* (10) and *Girish Chunder Ghose* v *The Queen Empress* (11) referred to

THIS was an application for the transfer of a case under section 110 of the Code of Criminal Procedure pending in the court of the Joint Magistrate of Cawnpore The facts of the case and the arguments are fully set forth in the order of the Court

Mr. *C Ross Alston* and Mr *A P Dube*, for the applicants

The Officiating Government Advocate (Mr *W Wallach*) for the Crown.

KNOX, J —This is an application for the transfer of a case pending in the court of the Joint Magistrate of Cawnpore and the prayer is that it be transferred to another district outside Cawnpore and be tried there by a competent Magistrate The application is as the law requires supported by an affidavit The affidavit extends over twenty one paragraphs The person who makes the affidavit is one Kunwar Chedi Singh and he describes himself as the *pairokar* of the applicants Jaggan and Budhu

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* Criminal Miscellaneous No 2 of 1914

(1) (1913) 12 A L J 33
(2) (1880) I L R 6 Calc., 491
(3) (1896) I. L. R 19 All., 64
(4) (1896) I. L. R. 23 Calc., 495
(5) (1877) 2 Q B D, 558 (567)
(6) (1889) 43 Ch D 366 (384)
(7) (1875) 1 Q B D 173
(8) (1881) 8 Q B D, 383
(9) (1894) 1 Q B D., 750 (758).
(10) (1864) 4 B and S, 915
(11) (1893) I. L. R., 20 Calc., 857

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The proceedings out of which the application arises are proceedings brought under section 110 of the Code of Criminal Procedure.

The record is not before me, but the applicants have been represented in court by learned counsel. The application has been opposed by the learned Government Advocate appearing on behalf of the District Magistrate of Cawnpore. From the arguments addressed to me the case is apparently one which was based upon section 110, clause *(d)*. The learned counsel who appears for Budhu describes the application, which was instituted as far back as the 23rd of October, 1913, as an application that the two men, Jaggan and Budhu with others had been in the habit of extorting moneyes, &c. I am told that no fewer than thirty witnesses had been put forward as being witnesses who would depose to the fact that Jaggan and Budhu were persons who habitually committed extortion. At a later stage of the case the police, I understand, asked that six witnesses more might be sent for: they were sent for and examined. The exact date is not before me, but it may be inferred from paragraph twelve of the affidavit that some time before the 18th of November, 1913, Jaggan and Budhu had been called upon to enter upon their defence and to produce their evidence. Jaggan and Budhu appear to have asked that the witnesses who had deposed against them might be recalled and cross-examined. For the purposes of this cross-examination Jaggan and Budhu, according to the affidavit, retained the services of Mr. Lincoln, barrister-at-law of the Lucknow Bar, and of Mr. Khare, Mr. David and Mr. Ajudhia Nath Tiwari of the local Bar. The cross-examination appears to have lasted up to the 24th of November, 1913, when in consequence of something which occurred in the course of the cross-examination Mr. Lincoln and Mr. Khare (vide paragraph 13 of the affidavit) threw up their briefs and retired from the case. According to the affidavit (vide paragraph 17) the Joint Magistrate fixed the 20th of December as the date for producing defence witnesses. A partial list of witnesses, so runs the affidavit, was obtained. Before the cross-examination was over, another list of over 200 witnesses was filed on the 19th of December. The request was that these 200 witnesses be summoned. The Joint Magistrate, so I am told by

the learned counsel for Budhu, asked that this list might be considered and modified No modification was made, and the Joint Magistrate by an order which is not before me, but which was read over to me in court, dismissed the application for the summoning of these witnesses and in his order stated that he refused it under the powers given him under section 257 of the Code of Criminal Procedure as an application made for the purpose of vexation and delay and for defeating the ends of justice He appears to have followed the law and to have recorded the reasons for refusing the application in writing In the arguments addressed to me in support of the application for transfer no attempt was made to support the application on any ground except that contained in paragraph *(e)* of clause (1) of section 526, i e that the order was expedient for the ends of justice From certain remarks made I was led to infer that the applicants apprehended that they would not have a fair and impartial inquiry in the court of the Joint Magistrate so I have considered the application both in the light of paragraph (*a*) and of paragraph (*e*) of section 526

I now turn to the affidavit

The first eight paragraphs of the affidavit set out matter which appears to me wholly irrelevant and which ought never to have found any place in the affidavit They are to the effect that Jaggan had interested himself in favour of one Pandit Ajudhia Nath Tiwari in an election connected with the Cawnpore Municipal Board somewhere in the year 1913 and that Budhu is on friendly terms with Jaggan These two, which are the main facts in the paragraphs, do not in any way point to the conclusion that a fair and impartial inquiry cannot be had in the court of the Joint Magistrate or that it is expedient that an order of transfer be made for the ends of justice The deponent appears to have been of the same opinion for in his affidavit he calls attention to the paragraphs, beginning from paragraph 9 onward as being matters concerning the application for transfer and it is very evident that the cardinal hinge of his application is what the deponent describes as a " heated controversy between the Joint Magistrate and Mr Lincoln " in which the latter argued that he should be allowed to do his duty towards his clients, unhampered.

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I will deal with that later on. Paragraphs 14, 15 and 16 refer apparently to the additional six witnesses whom the police asked might be sent for and examined. I take these paragraphs as representing in the strongest light the matters which the deponent thinks open to exception. Assuming these matters to be accurately stated, they appear to relate to evidence which in my opinion was irrelevant to the matter before the learned Joint Magistrate. Section 117 of the Code lays down that when a Magistrate is inquiring into a case of this kind he should inquire into the truth of information upon which action has been taken. The matter described in these paragraphs relates to occurrences which took place after the information mentioned in section 110 had been received by the Joint Magistrate. They were, therefore, outside that information. Section 117 does say that the Magistrate may take such further evidence as may appear necessary, but I am of opinion that the further evidence referred to here is evidence *ejusdem generis* with the evidence described in the words which immediately precede it. I cannot, however, learn from the application or the arguments addressed to me that if the Magistrate committed an error in taking this evidence he did so from any reason other than the liability to err which is human. The case has not yet been concluded. I am not in a position to pronounce upon this evidence at all, it may be more relevant than it appears to me to be, but if it be irrelevant, consideration of it can easily be excluded from the judgement. These paragraphs do not make it appear to me that from the action of the Magistrate either clause (*a*) or clause (*e*) need be considered.

With paragraphs 17, 18, 19 and 20, I shall presently deal. They relate to the dismissal of the application put in for the summoning of the 200 defence witnesses. Paragraph 21 was not insisted upon, and very properly not insisted upon. The only inference I draw from it is that Cheda Singh is a man who allows his mind and judgement to be diseased by a matter which was not open to any sinister conclusion.

It remains for me now to consider whether, either from the so-called heated controversy between the Joint Magistrate and the learned counsel for Jaggan and Budhu or the refusal to summon the 200 witnesses, it has been made to appear to me, for that is

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what the law requires, that a fair and impartial inquiry cannot be had in the court of the Joint Magistrate or that the order of transfer is expedient for the ends of justice. My attention was called to certain rulings, both of this Court and the Calcutta High Court, bearing upon section 526 of the Code of Criminal Procedure. The principles contained in this section exist and have existed from the passing of Act No. X of 1872, if indeed they did not exist in the Acts preceding that date, and they have been considered by both these Courts on more than one occasion. I do not propose to allude to all these cases or to certain other cases which were cited to me as to whether or not this Court has the power of transfering from one district to another, cases falling within section 110 of the Code of Criminal Procedure.

In a very recent case, i e., *Sumeshwar* v. *King-Emperor* (1), I had to consider very much the same question as that now before me, and I then came to the conclusion that the law did not intend that a transfer of a case should be ordered simply because an accused person thinks that he would not get an impartial trial, but the real question to be considered is whether on the facts disclosed in the application, and, I might add, in the affidavit supporting the application for transfer, there arises a reasonable apprehension that the Magistrate who is seised of the case may be prejudiced, wittingly or unwittingly, against the accused.

The learned counsel who appeared for Jaggan, while accepting that this was in consonance with previous rulings of this Court, contended that there were incidents in the present case from which the reasonable inference would be that the atmosphere in which this case would be tried in Cawnpore was now so heated that an order of transfer would be a proper order and that those incidents, though capable of explanation, were incidents calculated to create in the mind of the accused a reasonable apprehension that he might not have a fair and impartial trial. This very point arose and was considered by the Calcutta High Court in *Empress* v. *Nobo Gopal Bose* (2). The learned Judge who decided that case, in which the affidavit was to the effect that the case was causing considerable excitement in the district and that most of the inhabitants of the district had their sympathies enlisted on one side or the other, did

(1) (1913) 12 A. L. J., 33. (2) (1880) I. L. R., 6 Calc., 491.

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not consider it a sufficient reason This was the substance of what was held in *Farzand Ali* v *Hanuman Prasad* (1) and is apparently derived from the earlier case of *Dupeyron* v *Driver* (2) A careful study of both these cases will I think show that they have been somewhat misunderstood and have led more than once to the result that section 526 must be taken to really mean when ever it is made to appear to the High Court *or to the accused* that a fair and impartial inquiry or trial cannot be had in a Criminal Court ' &c The learned Judges who decided the Calcutta case appear to have rested their decisions on certain words used by LUSH J in *Serjeant* v. *Dale* (3) That was a case under the Public Worship Regulation Act 1874 and the question under consideration was whether the Bishop of London was by reason of interest prohibited from determining whether proceedings ought or ought not to be taken against an incumbent on account of alleged illegal practices It is a case which stands quite by itself

The principle which underlies or is contained in the maxim '*nemo debet esse judex in propria causa*' is that a person who has a judicial duty to perform disqualifies himself if he has a pecuniary interest in the decision which he is about to give or a bias which renders him otherwise than an impartial Judge In the latter case the question must be a question of substance and of fact whether he has in truth also been an accuser *Leeson* v *General Council of Medical Education and Registration* (4) The interest must be substantial [*Queen* v *Meyer* (5)] so as to make it likely that the justice has a real bias the mere possibility of bias is not sufficient to disqualify, *Queen* v *Handsley* (6) In *Allinson* v *General Council of Medical Education and Registration* (7) Lord ESHER delivered himself of the following exposition of the law—the passage will bear repetition *in extenso* — Public policy requires that in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed To use the language of MELLOR J in *The Queen* v *Allan* (8)—'It

(1) (1896) I L R 19 All 64
(2) (1896) I L R 23 Calc 495
(3) (1877) 2 Q B D, 553 (567)
(4) (1889) 43 Ch D 366, (384)
(5) (1875) 1 Q B D 173
(6) (1881) 8 Q B D 383
(7) (1894) 1 Q B D 750 (758)
(8) (1864) 4 B and S 915

is highly desirable that justice should be administered by persons who cannot be suspected of improper motives' I think that if you take that phrase literally it is somewhat too large, because I know of no case in which a man cannot be suspected. There are some people whose minds are so perverse that they will suspect without any ground whatever The question of incapacity is to be one 'of substance and fact' and therefore it seems to me that the man's position must be such as that in substance and fact it cannot be suspected Not that any perversely minded person cannot suspect him, but that he must bear such a relation to the matter that he cannot reasonably be suspected of being biassed I think that for the sake of the character of the administration of justice we ought to go as far as that, but I think we ought not to go any further" So also LOPES J, at 762

What were the incidents which the learned Judges had to consider in the Calcutta case of *Dupeyron* v *Driver* (1)? They found that the Magistrate had issued an order contrary to law, and so contrary that it was well calculated to create a reasonable apprehension in the mind of the accused that the Magistrate was biassed against him. They referred also to an older case of *Girish Chunder Ghose* v. *Queen Empress* (2), in which with the same view incidents were discussed They found that in that case the District Magistrate had initiated and directed the whole proceedings, he had apparently been personally interested in them, he had described matters which came under his own observation and from these incidents they came to the conclusion that there was a reasonable apprehension in the mind of the accused that he would not have a fair and impartial inquiry In *Farzand Ali* v *Hanuman Prasad* (3), the learned Judges of this Court who followed the rulings above quoted also considered incidents attached to the case They found that the Magistrate had been acting on information got out of court and that he permitted rumours relating to the accused in a pending case before him, to reach him out of court and allowed his mind to be influenced by such rumours He issued a warrant illegally directing the issue of an order of attachment of the whole of the property of the accused, movable and

(1) (1896) I L R, 23 Calc 495 (2) (1893) I L R, 20 Calc 857
(3) (1896) I. L. R., 19 All. 64.

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immovable, and all these incidents had taken place in connection with the case before him

In the present case what are the incidents? As I have already pointed out they are two The first is the so-called interference by the Joint Magistrate with the cross examination conducted by the learned counsel for Jaggan and Budhu and the refusal to summon 200 witnesses mentioned in a subsequent order There is nothing further I have examined both these orders as far as I could very carefully, and in both cases the Magistrate appears to have been acting in strict accordance with the law, he was exercising a jurisdiction which the law conferred upon him There is nothing which leads me to suppose that if after the witnesses, 20 or more mentioned in the first list had been examined the accused had gone on and satisfied the Magistrate that there were other witnesses the examination of whom was necessary in the interests of justice, the Magistrate would not have summoned those witnesses under the special power given under section 540 When the Magistrate was called upon to summon 200 witnesses in a matter of this kind, he would in my opinion have exercised his jurisdiction wrongly had he without further consideration summoned those witnesses and put them to the inconvenience of coming to court So far as I can judge he was right in his conclusion that the application was one made for the purpose of vexation and delay In any case he had jurisdiction to refuse the application and it has not been shown to me that the jurisdiction was wrongly exercised The suggestion in the affidavit that the Magistrate had given the accused only two days in which to produce his defence witnesses is a perverted view of what really did take place Next with regard to the interference with the cross-examination From the Magistrate's order, which was read out to me it appears, and the contrary has not been shown that the learned counsel for Budhu and Jaggan in cross-examining one witness put to him the question whether he had not been found guilty of cheating The allegation was denied. He put to another witness the question whether that witness had not been convicted of an offence under section 498 of the Indian Penal Code. This allegation also was denied, and from the order it would appear that it was when he was addressing a question of a similar nature to a third witness that the court stopped him

I go simply upon what is before me and it is open to the possibility that there has been some mistake or error in his order, but the contrary has not been shown If the order of the Judge is an accurate representation of what occurred I can only say that the learned advocate had no right whatever to put such *questions to the witness* *He was transgressing the provisions of* section 155 of the Evidence Act, and the Court was right in such a case in interfering under the provisions of sections 151 and 152 of the Evidence Act As the framer of the Act in his speech pointed out, these sections as far as their substance is concerned speak for themselves and they would be admitted to be sound by all honourable advocates and the public It is impossible for me to say what were the other interferences referred to The affidavit does not disclose them and the arguments addressed to me do not and it is my duty under such circumstances to hold that the Magistrate acted properly and in order *(omnia praesumuntur rite et solemniter esse acta)* The incidents are then incidents in accordance with the law they seem to me a judicious exercise of the discretion vested in the court the Judge was apparently up holding the order and dignity of the court, and I cannot infer from them that there is any danger of the inquiry being unfair or partial I find *no reason to suppose that the order if I did make* it, would be an order in the interests of justice, on the contrary such an order would militate against paragraph *(d)* of clause (1) of section 526 To sum up all the circumstances as disclosed to me show that there was no bias or probability of bias and no interest The Joint Magistrate appears to have gone no further than to take care that the principles of law laid down in the Criminal Procedure Code were properly observed and maintained in the case before him I therefore dismiss the application

Application rejected

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immovable, and all these incidents had taken place in connection with the case before him.

In the present case what are the incidents? As I have already pointed out they are two. The first is the so-called interference by the Joint Magistrate with the cross-examination conducted by the learned counsel for Jaggan and Budhu and the refusal to summon 200 witnesses mentioned in a subsequent order. There is nothing further. I have examined both these orders as far as I could very carefully, and in both cases the Magistrate appears to have been acting in strict accordance with the law; he was exercising a jurisdiction which the law conferred upon him. There is nothing which leads me to suppose that if after the witnesses, 20 or more, mentioned in the first list had been examined the accused had gone on and satisfied the Magistrate that there were *other witnesses the examination of whom was necessary in the* interests of justice, the Magistrate would not have summoned those witnesses under the special power given under section 540. When the Magistrate was called upon to summon 200 witnesses in a matter of this kind, he would, in my opinion, have exercised his jurisdiction wrongly had he without further consideration summoned those witnesses and put them to the inconvenience of coming to court. So far as I can judge he was right in his conclusion that the application was one made for the purpose of vexation and delay. In any case he had jurisdiction to refuse the application, and it has not been shown to me that the jurisdiction was wrongly exercised. The suggestion in the affidavit that the Magistrate had given the accused only two days in which to produce his defence witnesses is a perverted view of what really did take place. Next with regard to the interference with the cross-examination. From the Magistrate's order, which was read out to me, it appears, and the contrary has not been shown, that the learned counsel for Budhu and Jaggan in cross-examining one witness put to him the question whether he had not been found guilty of cheating. The allegation was denied. He put to another witness the question whether that witness had not been convicted of an offence under section 498 of the Indian Penal Code. This allegation also was denied, and from the order it would appear that it was when he was addressing a question of a similar nature to a third witness that the court stopped him.

I go simply upon what is before me and it is open to the possibility that there has been some mistake or error in his order, but the contrary has not been shown. If the order of the Judge is an accurate representation of what occurred, I can only say that the learned advocate had no right whatever to put such questions to the witness. He was transgressing the provisions of section 155 of the Evidence Act, and the Court was right in such a case in interfering under the provisions of sections 151 and 152 of the Evidence Act. As the framer of the Act in his speech pointed out, these sections, as far as their substance is concerned, speak for themselves and they would be admitted to be sound by all honourable advocates and the public. It is impossible for me to say what were the other interferences referred to. The affidavit does not disclose them and the arguments addressed to me do not and it is my duty under such circumstances to hold that the Magistrate acted properly and in order *(omnia praesumuntur rite et solemniter esse acta.)*. The incidents are then incidents in accordance with the law, they seem to me a judicious exercise of the discretion vested in the court, the Judge was apparently upholding the order and dignity of the court, and I cannot infer from them that there is any danger of the inquiry being unfair or partial. I find no reason to suppose that the order, if I did make it, would be an order in the interests of justice; on the contrary, such an order would militate against paragraph *(d)* of clause (1) of section 526. To sum up, all the circumstances as disclosed to me show that there was no bias or probability of bias and no interest. The Joint Magistrate appears to have gone no further than to take care that the principles of law laid down in the Criminal Procedure Code were properly observed and maintained in the case before him. I, therefore, dismiss the application.

Application rejected.

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GHURA *v.* SHITAB KUNWAR.

The plaintiff, who purchased under a sale held in execution of the decree, brings the present suit for physical possession of the two plots, alleging that the perpetual lease was fraudulent and collusive. It is quite clear as a general rule that a plaintiff in a suit for ejectment claiming physical possession must show a right to possession against all the world It, therefore, becomes of importance to see whether, if the perpetual lease had never been made, the plaintiff would have been entitled to a decree for physical possession against the mortgagor. The Tenancy Act provides that when a proprietor's proprietary right is sold he *ipso facto* becomes an ex-proprietary tenant of his *sir*. This is a right which neither the court nor the proprietor himself can take away or give up Consequently it is clear that the plaintiff would not have been entitled to a decree for possession against the mortgagor. This being so, it is clear that she cannot have a decree for possession against the present appellant. She is, no doubt, assuming the lease to be fraudulent, entitled to the rent which the ex-proprietary tenant ought to pay for the two plots. In our opinion the decree of the lower appellate court was under the circumstances a proper decree, and we accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court. We think under the circumstances (particularly as both parties contested the propriety of the decree of the lower appellate Court) that each party should bear his own costs in this court.

Appeal allowed.

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February, 25.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Ryves and Mr. Justice Piggott.

TRILOKI NATH (APPLICANT) *v.* BADRI DAS AND OTHERS (OPPOSITE PARTIES)*

Act No. III of 1907 (Provincial Insolvency Act), sections 5, 6, 15 and 16—Insolvency—Petition by debtor—Grounds for dismissing petition—Possibility of assets exceeding liabilities

Where an insolvency petition is presented by a debtor whose debts amount to Rs 500, and such petition fulfils the requirements of section 11 of the Provincial Insolvency Act, 1907, it is not a valid ground for dismissing the petition

*First Appeal No 149 of 1913 from an order of Muhammad Shafi, Additional Judge of Meerut, dated the 25th of June, 1913.

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that there may exist some reason for supposing that the debtor may not after all be unable to pay his debts in full unless there are circumstances indicating that the presentation of the petition was fraudulent and an abuse of the process of the Court

The provisions of section 15 of the Act are intended to apply to a creditor s petit on and not to one presented by a debtor

Uday Chand Maiti v *Ram Kumar Khara* (1), *Kali Kumar Das* v *Gopi Krishna Ray* (2), *Girwardhari* v *Jai Narain* (3), *Bidhala Din* v *Jagannath* (4), referred to *Nathu Mal* v *The District Judge of Benares* (5) distinguished. *Ponnusami Chetti* v *Narasimma Chetti* (6) not followed

THE facts of this case were as follows —

One Triloki Nath filed an insolvency petition in the court of the Additional Judge of Meerut

The petitioner complied with the provisions of section 11 of the Provincial Insolvency Act He alleged that his debts amounted to Rs 2 500, and that his property, which was worth only Rs 3 10 0, was not enough to pay them all Some of the creditors opposed the petition They stated that the property of the petitioner was worth more than Rs 3 10 0, and that in fact his assets were more than the debts, and that he was not entitled to be declared an insolvent. The court below found that the father of the petitioner was possessed of considerable movable and immovable property, over Rs 63,000 in value. It further found that during the life-time of the father the applicant executed a deed of release of his share in the property in favour of the father, and that the father died leaving a will in favour of the applicant's brother and mother. These documents in the opinion of that court were not *bonâ fide*, and therefore the petitioner was possessed of sufficient property to pay his debts It therefore dismissed the petition. The petitioner appealed to the High Court

Babu *Sital Prasad Ghose*, for the petitioner, submitted that the petition fulfilled the requirements of section 11 of the Act and the court was bound to declare the petitioner an insolvent if he proved that he was unable to pay his debts, which exceeded Rs 500 (Section 6, cl. 3 of the Provincial Insolvency Act) Section 15 of the Act did not apply to this case, as it was applicable only to applications presented by creditors An application made by a

(1) (1910) 15 C W N, 213
(2) (1911) 15 C W N 990
(3) (1910) I L R, 32 All, 645
(4) (1912) 9 A. L. J, 690
(5) (1910) I. L. R., 32 All., 547
(6) (1913) 25 M L J 545

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debtor could only be dismissed if it was shown that the debtor was not entitled to present it. [Section 15 (1) of the Act was referred to.] The duties of debtors are set out in section 43, and if the debtor fails to carry out the provisions of that section he is liable to imprisonment. The latter part of sub-section (1) of section 15 of the Provincial Insolvency Act (Act III of 1907) is a *verbatim* reproduction of section 7, sub-section (3) of the English Bankruptcy Act of 1883, and this section merely refers to an insolvency petition presented by a creditor. Section 8 of the English Act refers to petitions presented by a debtor, and under that section upon a debtor's statement as to inability to pay his debts the order follows as a matter of course. He referred to *Nathu Mal* v. *The District Judge of Benares* (1); *Bidhata Din* v. *Jagannath* (2); *Udai Chand Maiti* v. *Ram Kumar Khara* (3); and *Kali Kumar Das* v. *Gopi Krishna Ray* (4).

Dr. *Surendra Nath Sen* (with him Munshi *Girdhari Lal Agarwala*), for the respondents:—

If the applicant is able to pay his debts the Court should not declare him an insolvent. For in declaring him an insolvent the court will take his property in its possession and will be an agent of the petitioner. The application presented would be an abuse of the process of the Court. The explanation to section 5 gives the Court power to make an order both on the petition of the debtor and the creditor. The word used there is "may," and the Court would not be bound to make an order of adjudication as a matter of course. The provisions of section 15 (1) only apply to cases where the Court is bound to dismiss the petition. The Court should consider whether a petition is made *bonâ fide*. There should be no distinction between applications by debtor and creditor. The Court has inherent power to dismiss petitions. It is an abuse of the bankruptcy law to ask the Court to take possession of the property which is in the hands of the petitioner's brother and proceed to distribute the same among creditors; Halsbury's Laws of England, Vol. II, p. 46, paragraph 72; *Ponnusami Chetti* v. *Narasimma Chiti* (5).

(1) (1910) I. L. R., 32 All., 547.
(2) (1912) 9 A. L. J., 690.
(3) (1910) 15 C. W. N., 213.
(4) (1911) 15 C. W. N., 990.
(5) (1913) 2 I. C., 293; 25 M. L. J., 545.

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RICHARDS, C. J., and RYVES and PIGGOTT, JJ.—This appeal arises out of insolvency proceedings under Act III of 1907. The petitioner presented a petition asking that he should be adjudicated an insolvent. His petition complied with the provisions of section 11, and contained a statement that he was unable to pay his debts which exceeded Rs. 500. Notice went in the ordinary course to the creditors some of whom were represented or appeared when the debtor was examined and opposed adjudication. The debtor was examined and stated that his debts exceeded Rs. 500 and that his means and property were quite insufficient to pay those debts. At the instance of the opposing creditors his brother was examined, and he produced certain documents connected with the property of the family to which the debtor belonged. The learned Additional Judge appears to have considered that the documents which were produced were devices for saving the property of the debtor from his creditors. One of these documents purported to be a will of the debtor's father, the other purported to be a deed of relinquishment made by the debtor in favour of his father in the life time of the latter. It seems to us that the opinion of the learned Additional Judge amounted to no more than this, that he was not satisfied on the evidence that the debtor's debts exceeded his assets. He seems to have been largely influenced in arriving at this opinion because he thought that the alleged will and deed of relinquishment would not have been upheld in a court of law. He does not appear to have found or intended to find that the documents were forgeries. The petition was dismissed.

The petitioner debtor has appealed to this Court and it is argued on his behalf that under the circumstances of the case the Court was bound to adjudicate him an insolvent under section 16 (1) of the Act.

On behalf of the respondents it is contended that under the provisions of section 15 (1) the Court has power for any "sufficient cause" to dismiss the petition and that the fact that the petitioner debtor was unable to satisfy the Court that his debts exceeded his assets was quite sufficient cause for dismissing the petition. It was further contended that even if section 15 (1) did not apply, still the Court had power under its inherent jurisdiction to dismiss the petition in the present case as an abuse of the process of the court.

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Section 6 clause (3), provides that a debtor shall not be entitled to present an insolvency petition unless his debts amount to Rs 500, or he has been arrested or imprisoned in execution of a decree of any court for payment of money, or an order of attachment in execution of such a decree has been made and is subsisting against his property It is admitted in the present case that the debts did amount to Rs 500 The debtor was therefore, clearly "entitled to present" an insolvency petition An act of bankruptcy had been committed under section 5 by the presentation of his petition Section 16 (1) provides that where a petition is not dismissed under the preceding section and the debtor is unable to propose any composition or a scheme which shall be accepted by the creditors and approved by the Court in the manner thereafter provided, the Court shall make an order for adjudication

We have now to see whether the petition in the present case could have been dismissed under section 15 (1) This clause is taken almost *verbatim* from section 7 (3) of the English Bankruptcy Act of 1883 This section deals entirely with a creditor's petition and does not apply in any way to a debtor's petition It seems to us that the words or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made the Court shall dismiss the petition' refer to the Court being satisfied by the debtor that some sufficient cause exists why the order should not be made It seems to us that there is a fundamental distinction between the adjudication of a person as an insolvent on his own petition and an adjudication on the petition of a creditor All the disgrace and other consequences which flow from an adjudication of insolvency in the case of a petition by the debtor himself are the result of his own petition Furthermore, the creditors would not as a general rule be prejudiced or suffer loss by an adjudication of insolvency All the assets of the debtor ought to be available in payment of his debts, and if his assets exceed the latter so much the better for the creditors We are very far from saying that there is no inherent power for the Court by its orders in insolvency matters to prevent an abuse of the process of the Court, and in cases it may be quite necessary to dismiss a debto[illegible] o to be adjudicated an insolvent All that it is nece

say in the present case is that in our opinion the presentation by the debtor of his petition in this case did not amount to an abuse of the process of the Court. 1914

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The view that we take of section 15 is supported by the case of *Uday Chand Maiti* v. *Ram Kumar Khara* (1) and also by the case of *Kali Kumar Das* v. *Gopi Krishna Ray* (2) A similar view was taken by this Court in the case of *Girwardhari* v *Jai Narain* (3), and the case of *Bidhata Din* v *Jagannath* (4)

The case of *Nathu Mal* v. *The District Judge of Benares* (5) has been referred to It is clear that the remarks in the judgement cannot be regarded as a decision on the point now in question. The question there related entirely to a criminal trial and the question which arises in the present appeal was neither argued nor discussed Reliance is placed by the respondent upon the case of *Ponnusami Chetti* v *Narasimma Chetti* (6) In that case the facts were not altogether unlike the facts in the present case The Court, however, came to the conclusion on the facts before it that the presentation of the petition amounted to an abuse of the process of the Court We have already stated that in our opinion the facts of the present case do not constitute an abuse of the process of the Court. The question whether or not the assets would or would not exceed the debts would depend upon the result of a suit at law.

In our opinion the present appeal ought to be allowed. We accordingly allow the appeal, set aside the order dismissing the petition, and under the provisions of section 16 (1) we adjudicate the petitioner an insolvent and direct that the record be returned to the court below so that the matter may be proceeded with according to law. The cost of the appeal will be in the discretion of the court below when making its final order.

Appeal allowed.

(1) (1910) 15 C W N, 213
(2) (1911) 15 C W N, 900
(3) (1910) I. L R, 32 All., 645.
(4) (1912) 9. A. L. J, 699.
(5) (1910) I L. R., 32 All 547
(6) (1913) 25 Mad. L J, 545.

1914
March, 3

MISCELLANEOUS CIVIL.

Before Mr Justice Chamier and Mr Justice Piggott

GITA RAM AND OTHERS (DEFENDANTS) v KIRPA RAM (PLAINTIFF) *

Land tenures in Kumaun—Custom—Pasture land—Grant of pasture land disputed—Second appeal—Finding of fact—Civil Procedure Code (1908) *section* 100

According to the special law relating to land tenures in Kumaun land which was not allotted to villagers for purposes of cultivation was held to belong to the Government and might be granted to individual villagers for cultivation or the planting of trees But if such land were *gauchar*, or pasture land, a grant could only be made if it was not inconsistent with the general wishes and well being of the village community, and it was open to any villager to bring a suit to dispute the validity of such grant

Held on such a suit being filed that the finding of the appellate court that the grant in question was inconsistent with the general wishes and well being of the community was a finding of fact and could not be disturbed in second appeal.

THIS was a reference under Rule 17 of the Rules and Orders relating to the Kumaun division, 1894

The facts of the case appear from the order of reference which was as follows :—

"This is an application made by the respondent plaintiff for a declaration that certain land granted to the defendants as *nayabad* by Mr Stowell in 1911, was *gauchar* and could not be so granted The grant was opposed at the time by the plaintiff but his objections were set aside and a grant was made The present suit was instituted so long after this that the defendants respondents had built a wall around and planted trees on the land

"According to Stowell's Manual on Land Tenures and the *nayabad* rules as published in the Kumaun rules the law appears to be as follows —

"The cultivators of every village in Kumaun have certain plots of land assigned to them for cultivation These plots are called *nap* land, because they have been measured and generally numbered The rest of the land within the limits of the village remains Government land and can only be encroached on by the villagers for the purpose of cultivating or for planting trees with the executive permission of Government When executive permission is asked it may be given at the discretion of Government if the land is not what is called *gauchar* (pasturage) land, that is to say, land used by the villagers for pasturage If, however, it is *gauchar* land, then permission may only be given in favour of any particular cultivator when it is consistent with the general wish and well being of the village community, that is to say, when its appropriation for cultivation will not injuriously diminish the pasturage If it should be given without due regard to this consideration, the villagers or any of them may sue the favoured villager for a declaration that the permission is invalid,

* Civil Miscellaneous No 550 of 1913.

apparently on the ground that the whole village community has acquired customary rights in such land whereby the Government's right of disposal is defeated.

"In this particular suit Mr Stowell gave permission to the non-applicant (to Government) The court of first instance (i e the Assistant Commissioner) held that, although the land in question was useful for grazing purposes to the whole community and although the total amount of land that could be so used was very limited in extent, still he was not prepared to say that the permission given to appropriate the very small portion of land, i e just under two acres, would injuriously affect the villagers as a whole

"In first appeal the Deputy Commissioner held that the fact of the scantiness of the pasturable area in the village coupled with the consistent and determined efforts of the villagers in the past to resist any appropriation of it and lastly with the fact that the situation of the land made it likely that it would long ago have been appropriated but for a strong reason to the contrary, was sufficient to indicate that the permission in this case was inconsistent with the general wish and well being of the community

"The Commissioner on second appeal held that the Deputy Commissioner should not on merely circumstantial grounds have decided against the propriety of Mr Stowell s order He was also influenced in his decision by the fact that the appellant before him had spent large sums upon improving his grant

"The Government is advised that the latter reason is not a very strong one The grant was made in July 1911 The plaintiff referred the matter to the executive official for re-consideration of Mr Stowell's order in November 1911, and was directed by him to file a suit which he did in June 1912 In any case the decree might have been given to the plaintiff conditional on their refunding the expenditure The limitation for bringing the suit appears to be six years under article 120 of the Limitation Act As to the former reason, the Government is advised that no presumption in law could arise in favour of the correctness of Mr Stowell s action in making the grant The grant was only a grant of Government rights, and if the Government right had, before the grant was made, been defeated by a kind of customary easement in favour of the village community the grant was worth nothing

"The Government is also advised that, apart from the merits of the case, it is open to question whether the second appeal to the Commissioner involved any question of law and was, therefore, entertainable by him.

"I am to ask that the Hon ble Court may be moved to favour the Government with its opinion as to whether under section 100 of the Civil Procedure Code a second appeal lay to the Commissioner and if so, whether his decision was correct

"I am also to inquire what ord rs if any, as to costs should in the opinion of the Hon'ble Court be passed in this suit '

Munshi *Gobind Prasad*, for the applicants

Dr. *Satish Chandra Banerji*, for the opposite party.

CHAMIER and PIGGOTT, JJ —This is reference under Rule 17 of the Rules and Orders relating to the Kumaun division of

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GITA RAM v. KIRPA RAM

1894 The circumstances leading up to the reference are stated fully in the order and need not be repeated We are asked to give our opinion as to whether a second appeal lay in this case to the Commissioner and if so, whether his decision is correct Both parties before us admit that the law is as stated in the reference The main question for decision in the case was whether or not the grant of certain land by Mr Stowell in 1911 was inconsistent with the general wishes and well being of the community The land is admitted to be *gauchar*, or grazing land There is a large quantity of other land in the village, part of which is no doubt available for grazing purposes, but part is not available for such purposes as it consists of "rocky slopes" The Assistant Collector seems to have been acquainted with the village in question but he was not prepared to hold that the grant of two small plots, measuring together about two acres, to the defendant would affect the other villagers injuriously On appeal the Deputy Commissioner, for reasons given by him, was of opinion that there was enough to show that the grant was inconsistent with the general wishes and well being of the community. He relied on the fact that the amount of land suitable for grazing purposes in the village was small, on the constant and determined efforts of the villagers to resist any appropriation of it and lastly on the situation of the land itself and its proximity to the *abadi* It seems to us that the question which he decided was one of fact and that his decision ought not to have been disturbed by the Commissioner in second appeal. A point was taken in the memorandum of appeal to the Commissioner which was admissible under section 100 of the Code of Civil Procedure, namely, that the matter was *res judicata*, but there were no materials on the record for the decision of such a question and it does not appear to have been pressed The other grounds of appeal were not admissible

Our answer to the reference is that the appeal should have been dismissed by the Commissioner when he discovered that the plea of *res judicata* could not be substantiated We see no reason why costs should not follow the event

Opinion in favour of defendants

APPELLATE CIVIL.

1914
March, 4

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

JAGAN PRASAD AND OTHERS (DEFENDANTS) *v* INDAR MAL AND OTHERS (PLAINTIFFS) *

Act No I of 1872 (Indian Evidence Act), section 91—Hundi—*Renewal of* hundis *given as security for debt*—Hundi *sued on inadmissible for want of proper stamp*—*Right of creditor to fall back on previous* hundis

The defendants borrowed money from the plaintiffs and in return therefor drew four *hundis* in their favour. As these *hundis* became due the interest on the loan was paid and the *hundis* were renewed, the old *hundis* being on each occasion handed over to the defendants Ultimately the plaintiffs sued on a set of renewed *hundis*, but it was found that these particular *hundis* were insufficiently stamped and could not be admitted in evidence

Held that the plaintiffs were entitled to fall back upon the last preceding set of *hundis* and, as these were in the possession of the defendants, to give secondary evidence of their contents

THE facts of this case were as follows :—

The plaintiffs carried on business in the name and style of Mohan Lal Indar Mal at Kosi, and the defendants carried on business at Raya The defendants took loans from the plaintiffs on the 4th of July, 1908, and subsequent dates, and executed four *hundis* payable after sixty one days. The *hundis* were renewed from time to time, and Rs. 136 8 0 interest were paid on each renewal The last renewal was made on the 4th of July, 1910. The last *hundis* were written on paper insufficiently stamped The present suit was brought for recovery of the money due on these *hundis* Among the defences to the suit was the defence that the *hundis* being insufficiently stamped were not admissible in evidence and the suit could not be maintained as no other cause of action was set forth. The Subordinate Judge held that the *hundis* were not admissible in evidence, but that the plaintiffs could fall back upon the original debt of 1908, and subsequent dates which were kept alive by the payment of interest on each renewal. The defendants appealed to the High Court.

Mr *A. P Dube* (with him Babu *Jogindro Nath Chaudhri*), for the appellants :—

The *hundis* cannot be admitted in evidence and the suit is not maintainable The other side say that the previous *hundis* were

* First Appeal No 198 of 1912 from a decree of Bans Gopal, First Additional Subordinate Judge of Agra, dated the 9th of March, 1912.

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JAGAN PRASAD v. INDAR MAL

properly stamped, if so, the debt was discharged by giving these *hundis* and no suit on a money count is maintainable. The cases where a plaintiff was allowed to fall back on the original debt are not in point inasmuch as in those cases the documents originally given were defective documents Where a valid *hundi* is given in lieu of the debt the intention of the parties is that the *hundi* is to be the only cause of action and there is no cause of action on a money count Pollock on Contracts 8th Ed 241 If the plaintiffs had brought their suit before the *hundis* matured their suit would have been dismissed When fresh *hundis* are given in lieu of the previous *hundis* the previous *hundis* become inoperative and no suit lies on those *hundis* Reference was made to *Ram Sarup* v *Jasodha Kunwar* (1) and *Sri Nath Das* v *Angad Singh* (2) In this case the suit is based on the last *hundis* and there is no claim on a money count The pleadings cannot be changed Bullen and Leake on Pleadings 2nd Ed 1863 Even if the plaintiffs are allowed to fall back upon the original debt the date of advance is the date from which limitation will run From that date the suit is barred unless the renewal of *hundis* and payment of *hundiawan* save limitation I submit that renewal of *hundis* does not save limitation inasmuch as it is not shown that the old *hundis* were executed on properly stamped paper *Hundiawan* is not paid by the drawer but is deducted by the lender when the advance is made and it cannot therefore operate as an acknowledgment or payment of interest within the meaning of sections 19 and 20 of the Limitation Act

Mr *M L Agarwala* (with him The Hon ble Dr *Tej Bahadur Sapru* and Munshi *Narain Prasad*) for the respondents —

The *hundis* executed in 1908 became payable after sixty one days The money due on them became a debt and the suit could be brought on the *hundis* or for the debt If fresh *hundis* are given we cannot sue during their currency but as soon as they become due the original debt revives and so on One may put the case in another way Receiving another *hundi* in lieu of an existing *hundi* means that the debtor pays up the money and then takes it back again. Each renewal is a fresh loan The last *hundis* being not admissible in evidence we can fall back upon

(1) (1911) I L R 34 All. 158 (2) (1910) 7 A L J 459

the previous *hundis* which we say are written upon properly stamped paper The other side have got them and have not produced them Secondary evidence can, therefore be given of those *hundis*, although the other side have not been served with a notice to produce them The written statement of the defendants being a total denial of all previous *hundi* transactions they could not have produced them in this case and there was no use in giving a notice to them Evidence Act sections 65 (*a*), 66 (2) Proviso

Mr *A P Dube* replied

RICHARDS C J, and BANERJI J —This appeal arises out of a suit for money The plaintiffs allege in their plaint that they had a shop and that the defendants had another shop and that money dealings had taken place for a long time between them With their plaint they filed a copy of their books, so far as it related to their alleged dealings with the defendants, and from this it would appear that the transactions commenced about the 6th of July, 1908, and the 12th of March, 1909, when sums of money were advanced, that from these dates *hundis* were, from time to time, given and renewed Assuming the entries to be correct, they show that *hundis* were given for the principal sum of Rs 9,100, that when the time came for a renewal discount or interest was paid and the *hundis* were renewed for the same principal amount Jagan Prasad, defendant, met this by a denial of the plaintiff's right and by a special defence, contained in paragraph 12 of his written statement, in which he alleged that the *hundis*, which were alleged to be the last renewals by the plaintiffs, were in fact fictitious, and that the plaintiffs being short of money had asked them to draw these *hundis* upon them In the court below the defence of the other defendants was more or less confined to a denial that Jagan Prasad had any right to take loans on behalf of the joint family In the court below the books of the plaintiffs were produced and proved, and we have no doubt that the books are genuine The last renewal of the *hundis* could not, however, be given in evidence on account of a deficiency in stamps Notwithstanding this the court below has granted a decree to the plaintiffs for the amount claimed

It is now contended on behalf of the defendants appellants that the plaintiffs must be confined to their claim upon the last renewals of the *hundis*, and since they were insufficiently stamped,

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JAGAN PRASAD v. INDAR MAL

the suit must necessarily fail It was proved on behalf of the plaintiffs that the old notes were from time to time handed over to the defendants and were in their possession We can see no reason why the plaintiffs could not fall back upon the *hundis* that were given prior to the last renewals There was a change in the Stamp Act just about this time, which probably explains the deficiency in the stamp on the last renewals We do not think that any good purpose would be served by sending back the case to the court below for more formal proof of the *hundis* before the last We believe that they were in the possession of the defendants They could not having regard to the nature of the defence, have produced them, and the plaintiffs would be entitled to give secondary evidence of them. We think that secondary evidence was in fact given in the court below by the witnesses for the plaintiffs and by the proof and production of their books Under all the circumstances of the case we think that the decree of the court below was correct and ought to be confirmed We accordingly dismiss the appeal with costs

Appeal dismissed

REVISIONAL CRIMINAL

1914
March 5

Before Justice Sir George Knox

EMPEROR v. RAMESHWAR AND OTHERS.*

Criminal Procedure Code, sections 112 and 167—Security—Remand—Jurisdiction of Magistrate

Where a magistrate in a case sent up by the police for action to be taken by the magistrate under chapter VIII of the Code of Criminal Procedure, passed an order remanding the persons concerned to police custody under section 167, it was *held* that his action was *ultra vires* Even if section 167 applied at all to proceedings under chapter VIII of the Code no order could be passed under that section until the magistrate had recorded an order under section 112

Empress v *Babua* (1), *In the matter of petition of Daulat Singh* (2) and *King Emperor* v *Parmal Nai* (3) referred to

THIS was a case called for on perusal of the quarterly statement by Knox, J

The facts thereof sufficiently appear from the order of the Court —

* Criminal Revision No 1215 of 1913

(1) (1881) I L R 6 All. 132 (2) (1889) I L R 14 All, 45

(3) (1912) 10 A L J, 351

KNOX, J.– Rameshwar and two others were arrested by the police, presumably in exercise of powers under either section 54 or 55 of the Code of Criminal Procedure, on the 23rd of June, 1913. They were not produced before the court until the 25th of June, 1913. The police upon producing them before the magistrate asked for an order of remand, and that order of remand was granted. So far as the record shows, the order of remand was the usual order passed under section 167 of the Code Section 167 does not appear to have been framed for cases in which action is taken under section 112 of the Code. In any case a magistrate acting under chapter VIII of the Code has no power to act until after he has recorded an order in writing under section 112 If this case had been properly dealt with, the magistrate should, under section 112, have made an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it was to be in force, and the number, character and class of sureties required That order should then and there have been read over to Rameshwar and others, under section 113. The case was not one which fell under section 114, for Rameshwar and others were present in court After the order had been read over, the magistrate should have proceeded to inquire into the truth of the information upon which action had been taken and to take such further evidence as might appear necessary In brief, no person is to be called upon to show cause why an order should not be made against him until there is before the magistrate some information which such magistrate has reason to believe The magistrate has only to read section 114 carefully and he will see that, even when immediate arrest of the person is considered expedient, there must be before the magistrate a report or information, and the substance of that report or information must be recorded by the magistrate The Code gives the magistrate no power to issue a summons, warrant or order of detention until he has first upon his table something recorded by him in writing showing the grounds upon which he is taking action. No possibility is given or intended to be given for persons to be detained by orders of a magistrate until the magistrate has first by a separate order in writing shown that he has considered over the order which he is about to make and has reason to believe that such an order is

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EMPEROR v. RAMESHWAR.

required in the interests of the public. The detention between the 25th of June, and the 2nd of July, 1913, was action not warranted by law. The error pointed out by this Court in *Empress* v. *Babua* (1), *In the matter of the petition of Daulat Singh* (2) and *King-Emperor* v. *Paimal Nai* (3) has been repeated in the present case, and as long as it continues to be repeated so long will persons whose cases should be promptly considered and decided be kept in custody while the police lay themselves open to the suspicion of ransacking the country round in order to justify the action they have taken. In the present case these persons were detained in custody for all but two months. Now if the police had got together the information before they proceeded to arrest Rameshwar and others, this case should easily have been decided well before the 24th of June, 1913. Let the record be returned.

Record returned.

APPELLATE CIVIL.

1914 *March*, 5.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

INDARPAL SINGH AND OTHERS (DEFENDANTS.) v. MEWA LAL AND OTHERS (PLAINTIFFS) AND PODAI TEWARI AND OTHERS (DEFENDANTS.)*.

Civil Procedure Code (1908), order II, rule 2; order XXXIV, rule 14—Procedure—Suit by mortgagee for simple money decree against mortgagor—Subsequent suit for sale on mortgage not barred—Res judicata—*Limitation—Acknowledgment.*

Certain mortgagees sued for a simple money decree in respect of their mortgage debt, stating that they had relinquished their claim under their mortgage, and obtained a decree as prayed. The decree in this suit stated that "the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." As, however, this decree was not satisfied, the plaintiffs, mortgagees, proceeded to put their mortgage into court and prayed for a decree for sale on it. *Held* that the former proceedings were no bar to the present suit.

THE plaintiffs in this case brought a suit for sale upon a mortgage executed on the 6th of September, 1895, by one Amir Singh, his four sons and his wife in favour of Mewa Lal and Lachmi Narain plaintiffs. Prior to the execution of

*First Appeal No 204 of 1912 from a decree of Guru Prasad Dube, Subordinate Judge of Allahabad, dated the 13th of February, 1912.

(1) (1891) I. L. R., 6 All., 132. (2) (1889) I. L. R., 14 All., 45. (3) (1912) 10 A. L. J., 357.

that mortgage another mortgage had been executed in favour of the Akhara Panchaiti in 1893 A suit was brought by the prior mortgagees, and a decree was obtained by them under a compromise to which the present plaintiffs were also parties After this compromise was made, the plaintiffs, on the 29th of March, 1900, brought a suit on the basis of their mortgage deed for a simple money decree, and they did not seek to enforce their right to bring the mortgaged property to sale In that suit a decree was passed in favour of the plaintiffs, but, as the amount of the decree was not paid, the plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage Various pleas were set up in defence, but they were overruled by the court below and a decree was made in the plaintiffs' favour for sale of the mortgaged property The decree however, provided that the plaintiffs would not be entitled to a decree absolute for sale unless they relinquished all their rights under the money decree obtained by them

The defendants appealed to the High Court

Maulvi *Muhammad Rahmat-ullah,* for appellants

The Hon'ble Dr *Sundar Lal* and Babu *Benoy Kumar Mukerji* for the respondents

RICHARDS, C J, and BANERJI J —This appeal arises in a suit brought by the plaintiffs respondents for sale upon a mortgage executed on the 6th of September, 1895, by one Amir Singh, his four sons and his wife in favour of Mewa Lal and Lachmi Narain, plaintiffs Prior to the execution of that mortgage another mortgage had been executed in favour of the Akhara Panchaiti in 1893 A suit was brought by the prior mortgagees, and a decree was obtained by them under a compromise to which the present plaintiffs were also parties After the compromise was made the plaintiffs, on the 29th of March, 1900, brought a suit on the basis of their mortgage deed for a simple money decree and they did not seek to enforce their right to bring the mortgaged property to sale In that suit a decree was passed in favour of the plaintiffs, but, as the amount of the decree was not paid, the plaintiffs brought the suit out of which this appeal has arisen to enforce the mortgage Various pleas were set up in defence, but they were overruled by the court below, and a decree was made in the

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INDARPAL SINGH v. MEWA LAL

plaintiffs' favour for sale of the mortgaged property The decree however provides that the plaintiffs would not be entitled to a decree absolute for sale unless they relinquished all their rights under the money decree obtained by them

The defendants, who are the mortgagors and members of their family, have preferred this appeal, and the first contention raised on their behalf is that in view of the provisions of order II, rule 2, of the Code of Civil Procedure, the plaintiffs are not entitled to maintain this suit This contention has in our opinion, been rightly repelled by the court below The answer to it is furnished by the provisions of order XXXIV, rule 14 of the Code That rule provides that if a decree is obtained under a mortgage, the property comprised in that mortgage will not be sold in execution of such a decree unless the mortgagee obtains a decree for sale of the property, but order II, rule 2 shall be no bar to the maintenance of a suit for sale. It cannot be contended that the first suit brought by the plaintiffs for a money decree could not be maintained It is true that order II, rule 1, provides that all suits should be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. The penalty for not following the directions contained in that rule is provided by rule 2 Ordinarily if rule 1 was violated rule 2 would preclude the plaintiff from beginning a second suit, but in the case of a mortgage we have the distinct provision in order XXXIV, rule 14 which permits of a suit being brought for sale upon the mortgage in spite of the provisions of order II rule 2 Therefore it is manifest that the rule last mentioned is no bar to the present suit It is urged that the bar is afforded by the fact that in the plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. If this statement be regarded as an agreement releasing their rights as mortgagees that agreement, being without consideration, cannot be enforced The mere averment in the plaint that the plaintiffs gave up their right under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee rights.

It is next contended that section 11 of the Code of Civil Procedure is a bar to this suit The matter now in dispute was never

directly or otherwise in issue between the parties in the former suit, and it was not a matter which could have formed the ground of attack for the relief claimed in that suit. Therefore, in our opinion section 11 or any of the explanations to that section has no application to the present case.

The next contention was that the present claim was barred by limitation. As to this we may only point out that in the written statement filed in the previous suit the mortgage in question was admitted. So that there was an acknowledgment of liability under the mortgage before the expiry of the prescribed period of limitation, and a fresh start for the computation of limitation accrued to the plaintiffs from the date of the acknowledgment. In the written statement mentioned above the allegations in the plaint were admitted, including an allegation as to the mortgage and the amount payable under the mortgage being due, and the only contention raised was that the stipulation as to interest was hard and unconscionable. We think that the court below came to a right conclusion in holding that the claim was not time barred. The acknowledgment, having been made by the manager of the joint Hindu family, was in our opinion binding on the other members. It is not suggested that there was any fraud or collusion in connection with the acknowledgment.

The next contention is that in the money decree which was passed in the former suit the Court stated that 'the plaintiff would not be entitled to bring to sale the property mortgaged in the bond sued on.' This provision in the decree we understand to mean that under the decree which was passed by the court the decree holders would have no right to bring the mortgaged property to sale, that is to say, that the mortgagees would not be allowed to violate the provisions of section 99 of the Transfer of Property Act. The Court evidently thought it possible that the plaintiffs might try to put the property to sale contending that they had relinquished their right to enforce the mortgage, and therefore, it considered it desirable that it should be clearly provided in the decree that they would not be allowed to do so. We do not think that the Court intended to order or ordered that there should never be a suit for sale of the mortgaged property.

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INDARPAL SINGH v MEWA LAL.

A further contention was raised that the plaintiff should not be allowed interest at a higher rate than that allowed by the decree to which we have referred As to this we may mention in the first place that no such contention was raised either in the court below or in the memorandum of appeal to this Court Further, as the plaintiffs are entitled to sue upon their mortgage they have a right to claim interest at the stipulated rate up to the date fixed for payment. This part of the defendant's case is as untenable as the rest.

As to the costs of the previous suit in regard to which a contention was put forward on behalf of the appellants, we may observe that the plaintiffs will not be entitled to recover those costs, having regard to the terms of the decree passed in this case by the court below. The costs of the present suit were incurred by the plaintiffs because the appellants did not discharge the money decree which was passed against them, and the plaintiffs have, therefore in our opinion, been rightly awarded the costs of the present litigation

We accordingly dismiss the appeal with costs We extend the time for payment for six months from this date. Interest at the stipulated rate will run to the extended date No further interest will be allowed after such date.

Appeal dismissed

1914
March, 11.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

ABDUL AZIZ AND OTHERS (DEFENDANTS) v MASUM ALI AND OTHERS (PLAINTIFFS) *

Committee for collection of subscriptions to rebuild a mosque—Neglect of treasurer to pay his own subscription and to collect other subscriptions promised—Treasurer not legally liable

A movement having been set on foot for re constructing a mosque, A and J promised to subscribe Rs 500 each A was appointed treasurer of the committee for collecting subscriptions J gave a cheque for his promised subscription of Rs 500, but owing, first, to some defect in the endorsement, and later on to its having become out of date, it was never cashed. The mosque also was never re constructed A having died, his heirs were sued by the members of the committee for the amount of the unpaid subscriptions *Held*, that neither A nor his heirs were liable for payment of the money

* Second Appeal No 1686 of 1912 from a decree of H. M Smith, District Judge of Agra, dated the 7th of September, 1912, modifying a decree of Kalka Singh, Subordinate Judge of Agra, dated the 26th of September, 1910

THE facts of this case were as follows —

There was an Islam Agency Local Committee at Agra. A certain mosque had to be repaired and subscriptions were raised for the repairs. Munshi Hafiz Abdul Karim was appointed treasurer, and money was to be realized by and deposited with him. He himself promised to pay Rs 500. Another sum of Rs 500 was promised by one Jan Muhammad who sent a cheque for the amount to the treasurer. The treasurer sent it for collection to the bank in September, 1907, but they returned it as it was not properly endorsed. It was again presented to the Bank nearly a year and a half afterwards in January, 1909 but was returned as being out of date. Hafiz Abdul Karim died on the 20th of April 1909. This suit was brought against the heirs of Hafiz Abdul Karim for the recovery of this Rs 1,000, that is, Rs 500 promised by him and Rs 500 the amount for which Jan Muhammad had paid a cheque which was not cashed in time, and another item the liability for which was not disputed. The court below made the heirs liable for the Rs 1,000. The defendants appealed to the High Court.

The Hon'ble Dr *Tej Bahadur Sapru* (Maulvi *Muhammad Ishaq* with him), for the appellants —

In the case of the money promised by the treasurer himself there was nothing to show that it went beyond the stage of promise. He had of course all the money in his hands but he had not transferred it to the account of the fund from his private account. Nor could the committee say that they had incurred any liability on the strength of that promise. There was a case—*Kedar Nath Bhattacharji* v *Gorie Mahomed* (1) but it has been criticized by Sir Frederick Pollock in his Indian Contract Act at page 15. See also Page on Contracts Sec 298 page 441. No question of estoppel could arise, as the committee had done nothing in pursuance of that promise and this distinguished the present case from the case in 14 Calcutta. As to the second item the heirs of the treasurer could only be liable for his neglect in collecting the money of the cheque if they had benefited by his neglect. The action was a personal one and died with the person, *actio personalis moritur cum persona*. Besides the treasurer was an

(1) (1886) I.L.R., 14 Calc. 64

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honorary treasurer and could scarcely be held liable as an agent and even of he could be treated as an agent he was a gratuitous agent, and as such neither he nor his heirs could be held liable upon the facts found The lower appellate court had relied on Act XII of 1855 In that Act the term "wrong' was used in the sense of "tort" and the wrong if any, was committed in September, 1907, when the cheque was returned by the bank and the Hafiz took no further steps to realize the money The plaintiffs had to show that their action was within a year of the alleged tort He cited *Krishna Behary Sen* v *The Corporation of Calcutta* (1) and *Sreemutty Chunder Monee Dassee* v *Santo Moonee Dassee* (2)

Dr *S M Sulaiman* for the respondents —

As to the promise by the treasurer himself, the money would in any case have gone to him, and the account, if any, would be in the possession of the defendants The Hafiz must be deemed to have paid the money, he had the intention of paying it, his name appeared in the list of subscribers prepared at the time and the presumption was that he paid it He could not do any overt act to mark the payment As to the second item paid by cheque the Committee suffered loss through his negligence The question was would he have been liable if he were alive He was appointed an agent to realize the money and spend it on a particular purpose He would be liable even if he were a gratuitous agent Pollock on the Indian Contract Act, page 568 He not only was appointed agent but he undertook to do the work, that made a difference And there was no doubt that it was a case of gross negligence He left the committee under the impression that the money had been realized

RICHARDS C J, and BANERJI J — This appeal arises out of a suit brought by the plaintiffs against the heirs of Munshi Abdul Karim. The plaintiffs are the members of the Islam Local Agency Committee, Agra It appears that in the year 1907 a movement was set on foot to collect money for repairing and re constructing a mosque known as Masjid Hammam Alawardi Khan. The Local Agency Committee themselves sanctioned a subscription of Rs 3 000, besides this amount Rs 100 were paid in cash at that time by Hakim Shafi ul lah, Rs 500 were promised by Munshi

(1) (1904) I L R 31 Calc 406 (2) (1864) 1 W R, C R, 251

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Abdul Karim, and another sum of Rs '500' was promised by Munshi Jan Muhammad Munshi Abdul Karim was appointed treasurer The Local Agency Committee handed over their contribution of Rs 3 000 to Munshi Abdul Karim and he also received the donation of Rs 100 from Hakim Shafi ul lah Munshi Jan Muhammad gave a cheque for Rs 500, dated the 12th of September, 1907 On the 29th of September 1907, the cheque was presented for payment but it was returned by the bank with a note that the endorsement was not regular It was again presented on the 12th of January 1909, when the bank returned the cheque with a note that it was out of date Munshi Abdul Karim died on the 20th of April 1909 The present suit was instituted against his heirs on the 14th of April 1910 Munshi Jan Muhammad died in May 1910 The defendants do not dispute the right of the plaintiffs to recover the sum of Rs 3 100, they have admitted this part of the plaintiffs' claim all along It is admitted on both sides that nothing has been done to carry out the repairs and re construction of a part of the mosque Defence is however taken to two items, viz the Rs 500 represented by the cheque of Munshi Jan Muhammad and the subscription of the deceased Munshi Abdul Karim The court of first instance granted a decree for the subscription promised by Munshi Abdul Karim but dismissed the suit in so far as it related to the claim for Rs 500 the subscription of Munshi Jan Muhammad The lower appellate court granted a decree for the entire claim It appears to us that the suit cannot be maintained in respect of either item With regard to the subscription of Munshi Abdul Karim, this was a mere gratuitous promise on his part Under the circumstances of the present case it is admitted that if the promise had been made by an outsider it could not have been enforced We cannot see that it makes any difference that Munshi Abdul Karim was himself the treasurer There is no evidence that he ever set aside a sum of Rs 500 to meet his promised subscription As to the other item viz the amount of Munshi Jan Muhammad s cheque, we see great dificulty in holding that a suit could have been brought against Munshi Abdul Karim in respect of this cheque during his life time His undertaking of the office of treasurer was purely gratuitous He might at any

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time have refused to go on with the work It is said that he must be regarded as the agent of the committee and that if he was the agent he was guilty of gross negligence and accordingly would have been liable for any loss the Committee sustained In our opinion Munshi Abdul Karim cannot be said to have been an agent of the committee even if he was, it is very doubtful that he could have been held guilty of gross negligence He had presented the cheque for payment, the mistake in the endorsement was a very natural one and the delay in re presenting the cheque or getting a duplicate from the drawer may well be explained by the delay which took place in carrying out the proposed work In our opinion under the circumstances of the present case Munshi Abdul Karim could not have been sued in his life time It is quite clear that if no suit lay against Munshi Abdul Karim in his life time, no suit could be brought after his death against his heirs The result is that we allow the appeal to this extent that we vary the decree of the court below by dismissing the claim in respect of the two items of Rs 500 each The appellants will get their costs of this appeal In the court below the parties will pay and receive costs in proportion to failure and success

Decree varied

1914 *March* 16

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji

BHAGWAN SINGH AND OTHERS (DEFENDANTS) v MAZHAR ALI KHAN (PLAINTIFF)*

Act No IV of 1882 *(Transfer of Property Act) section* 82—*Mortgage—Contribution—Principle upon which contribution should be assessed—Civil Procedure Code* (1908) *order XXI, rule* 89

Where a co mortgagor is suing the other co mortgagors for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage the Court in assessing contribution has first to ascertain the values of the various items of property in question as they stood at the date of the mortgage next the rateable liability of each item for the amount payable under the decree next how much each item has contributed to the payment of the decretal amount, disregarding any purchase money which any of the purchasers has paid or retained and it should then proceed to apportion the liability between the different items

*First Appeal No 261 of 1912 from a decree of Abdul Hasan Additional Subordinate Judge of Moradabad dated the 20th of May 1912

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BHAGWAN SINGH v MAZHAR ALI KHAN

Hari Raj Singh v *Ahmad ud din Khan* (1) referred to

Held further that where some of the mortgaged properties are sold by auction sale and the owner of the properties sold gets the sale set aside under order XXI rule 89 of the Code of Civil Procedure he cannot claim contribution under section 82 of the Transfer of Property Act with respect to the 5 per cent of the purchase money paid to the purchaser or the auction fees paid by him

THIS was a suit by the purchaser of a portion of certain property comprised in a mortgage against his co mortgagors to recover from them contribution upon the ground that the property purchased by him had been made to pay more than its rateable share of the mortgage debt The facts of the case are fully stated in the judgement of the Court

Babu *Sital Prasad Ghosh* for the appellants

Pandit *Mohan Lal Sandal* for the respondent

RICHARDS C J, and BANERJI, J —This and the connected appeals arise out of a suit for contribution brought by the plaintiff, Mazhar Ali Khan The claim appears to have been brought on a wrong principle and the parties went to trial on a mistaken idea of the principle which governs suits of this description It appears that on the 14th of March 1889 one Musammat Kundan made a mortgage of eleven items of property in favour of Muhammad Bakhsh and Khuda Bakhsh On the 15th of March, 1889 the mortgagees whose mortgage was a usufructuary mortgage, granted to the mortgagor a lease of the mortgaged property and for securing the payment of the rent reserved by the lease the mortgagors granted a second mortgage of their property to the mortgagees A part of the mortgaged property, namely, the zamindari share in the village of Adampur was taken away by a pre emptor, and it seems to be the common case of the parties that this part of the mortgaged property was no longer to be regarded as part of the mortgage security The present plaintiff purchased one of the mortgaged villages namely, Champauli, and Roshan Singh (the predecessor in title of the defendants, Nos 1 6) purchased Mahmana and Milk Adampur The total amount of consideration for these two purchases was Rs. 11,000, but this was not paid to the vendor A suit for redemption of the usufructuary mortgage was brought by the purchasers and by Musammat Alim un nissa, to whom the interest of the mortgagor had passed, and a decree for redemption was obtained on the

(1) (1897) I L. R., 19 All 545

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13th of September, 1902 the amount of the mortgage money to be paid by the plaintiffs being declared to be Rs 11 887 3 3 This sum appears to have been paid, and the plaintiffs in the redemption suit apparently got possession Subsequently the original mortgagees, under the *qabuliat* executed in their favour on the 15th of March 1889, brought a suit for arrears of the rent reserved by the lease granted by them and they prayed for sale of the property hypothecated under the *qabuliat* to secure the proper payment of the rent A decree was passed by the court directing the plaintiffs to that suit to pay into court the amount of the redemption decree namely Rs 11 887 3 3 as a condition precedent to their obtaining a right to sell the hypothecated property They paid that amount and were entitled to realize that sum as well as the amount due to them the total of which was Rs 18 289 5 4 by sale of the hypothecated property Part of this sum was paid into court in different amounts but this did not satisfy the decree and accordingly on the 20th of May, 1909, the villages of Champauli and Maharana and mango groves in Tashtpur (that is properties Nos 5, 6 8 and 9 specified in the judgement of the court below) were sold by auction and were purchased by some persons who are outsiders to this suit The plaintiff deposited the amount for which the property had been put up to sale as also the 5 per cent required to be paid to the auction purchasers under order XXI rule 89 of the Code of Civil Procedure and the sale fee, and the sale was set aside Thereupon the plaintiff brought the suit out of which these appeals have arisen for contribution on the allegation that his property had had to bear more than its proportionate share of liability In putting forward these matters what he claimed was this He said that out of the total amount which had been deposited in full satisfaction of the decree and the 5 per cent paid to the auction purchasers and the sale fee, he had paid Rs 14 346 3 3 Out of this sum he gave credit for Rs 5 750, the amount of the consideration for the sale in his favour which he had not paid to his vendor and he claimed the balance from the defendants the owners of the other properties ordered to be sold by the decree in the suit for arrears of rent to which we have referred above He left out of consideration the proportionate amount

of liability of his property for the mortgage which was given effect to by the decree aforesaid The court below also in deciding the case declared the defendants liable for the amounts for which they had purchased parts of the property, and has wholly, as it appears to us failed to take into consideration the principles of the rule laid down in section 82 of the Transfer of Property Act In a suit of this kind where several properties belonging to different persons are liable under the same mortgage and the owner of one of the properties discharges the mortgage the owners of all the properties liable under the mortgage are bound to contribute their *quota* of liability for the mortgage debt Therefore in the present case what the court ought to have done was to have determined the value of the several items of property now belonging to different owners The value to be so ascertained should be the value at the date of the mortgage, and not necessarily the price which was paid for it by the present owners After ascertaining the value of the different properties the court should have determined what was the rateable liability of each of the properties for the total amount of the mortgage debt, that is, of the amount payable under the decree The court must then ascertain how much each party has contributed to the payment of the decretal amount In making this inquiry it ought to disregard the purchase money which any of the purchasers may have paid or retained The purchase money was money which belonged to the vendor that is to say, the mortgagor, and it was only retained by the purchasers for the purpose of discharging the prior mortgage generally Having ascertained the amount each property has contributed, the court should next proceed to apportion the liability between the different properties In so apportioning the liability each property must be debited with its own share of liability We may illustrate this by an example Suppose three properties A, B and C, belonging to different owners are comprised in one mortgage for Rs. 20,000 Property A is worth Rs 20 000 Properties B and C are worth Rs 10 000 each The owner of property A pays off the entire mortgage He can recover Rs 5 000 from each of the other properties Again suppose the properties all belong to the same owner Property A is sold to X for Rs 20,000, X retaining Rs 10,000 out of the purchase money to meet his shares of the

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mortgage. Properties B and C are sold to other persons X then pays off the entire mortgage X can only recover Rs 2,500, from each of the other owners The mortgage debt must be deemed to have been reduced by Rs 10 000 by the mortgagor himself when he allowed X to retain Rs 10 000 out of the pur chase money On this point we may refer the court below to the case of *Hari Raj Singh* v *Ahmad ud din Khan* (1) In the present case the court has not charged the plaintiff with any portion of the amount for which his own property is liable but has made the defendants and their property liable not only for their own *quota* of the debt but also for the plaintiff's own share This is clearly wrong We may mention here also that when the court is ascertaining the amount which the plaintiff has contributed to the discharge of the mortgages it will disregard the sum of Rs 5,750 which the plaintiff himself admits he retained and has never applied in discharge of the mortgage

Again, we find that the court below has included a sum of Rs 610 and also Rs 37, in all Rs 647, being the 5 per cent which had to be paid to the auction purchaser when the sale was set aside and the auction fees These are not sums which would come under section 82 of the Transfer of Property Act and they could only be awarded against the defendants upon the equitable ground of salvage Under no circumstances could any portion of this sum be awarded against the defendants other than defendants Nos 1—6 and 8 and 10 because their property was not sold Again we find that defendant No 10 pleaded that he had purchased part of the mortgaged property and that he had paid into court a sum of Rs 628 12 0 as the amount rateably due from him If upon ascertaining the liability of this defendant in the manner which we have directed it is found that the sum of Rs 628 12 0 is sufficient to cover his liability the suit ought to be dismissed against him, and if it is not sufficient he ought at least to get credit for the amount so deposited or to be allowed to withdraw it Similarly if the amount paid by the plaintiff does not exceed the amount for which his property is rateably liable his suit should be dismissed There are other matters to which having regard to the order we intend to make we do not

(1) (1897) I L R 19 All 545

think it necessary to refer In our opinion there has been no proper trial of the suit and the case ought to be remanded for re-trial We accordingly set aside the decree of the court below and remand the case with directions to re-admit it under its original number in the register and re-try it, bearing in mind the observations made above The parties will of course be *entitled to adduce further evidence Costs of this appeal will* be costs in the cause We hope that as we have settled the principle upon which the case ought to be proceeded with, the parties will be wise enough to come to a settlement without incurring the expenses of a fresh trial

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BHAGWAN SINGH *v* MAZHAR ALI KHAN

Appeal decreed and cause remanded

REVISIONAL CIVIL

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

MAHABIR PRASAD (PLAINTIFF) *v* THE COLLECTOR OF ALLAHABAD (DEFENDANT)*

1914 *March* 19

Civil Procedure Code (1908) *order XLVII rule 1—Review of judgement—Suit dismissed for want of necessary notice as well as on the merits—Ground of review only touching the merits*

A suit against the Court of Wards was dismissed on two grounds (1) that the notice given by the plaintiff under the Court of Wards Act was defective and (2) that the plaintiff was illegitimate An application was made for review of judgement on the ground of discovery of new and important evidence on the question of legitimacy *Held*, that the application was properly dismissed inasmuch as the reversal of the decision on the question of legitimacy on the reception of new evidence would not lead to the modification or setting aside of the original decree

THE facts of this case were as follows —

Mahabir Prasad brought a suit for possession against the Collector of Allahabad as Manager of the Court of Wards The suit was dismissed on two grounds—(1) that the notice given by the plaintiff as required by section 48 of the Court of Wards Act (Act No III of 1899, Local) was defective, and (2) that the plaintiff was not the legitimate son of his father The plaintiff did not appeal against the decree dismissing the suit, but after some time he applied for review of judgement on the ground of the discovery of new and important evidence on the question of the plaintiff's legitimacy The Subordinate Judge issued notice

* Civil Revision No 154 of 1913

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to the other side and after hearing the parties rejected the application The plaintiff applied in revision to the High Court

Mr *A H C Hamilton* (with him Babu *Beni Madho Ghosh*) for the appellant submitted that the applicant should have been allowed an opportunity of producing evidence to substantiate his application for review of judgement The court having issued notice to the other side had no jurisdiction to reject the application on the ground that the application for review was defective inasmuch as it did not challenge the finding of the Subordinate Judge on the question of notice

Mr *A E Ryves* for the opposite party, submitted that even if the court below had set aside its finding on the question of plaintiff's legitimacy, it could not have reversed the decree dismissing the suit, because the dismissal was further based on the finding that no proper notice had been given under the law The finding on the question of the insufficiency of the notice was quite sufficient for the dismissal of the suit and it was not necessary for the court to decide the issue as to the legitimacy of the plaintiff He relied on *Bachchu Singh* v *The Secretary of State* (1), and submitted that so long as the plaintiff did not challenge the finding of the court on the question of the sufficiency or otherwise of the notice under section 48 of Act III of 1899 (Local) he was not entitled to a reversal of the decree and the court was justified in refusing to review its finding on the question of legitimacy The order of the court below is correct

Mr *A H C Hamilton* in reply submitted that the Subordinate Judge was bound to consider the application on the merits and if he had considered the merits of the case and allowed the application for review, a new decree would have followed He relied on *Kanhaiya Lal* v *Baldeo Prasad* (2)

MUHAMMAD RAFIQ and PIGGOTT JJ —This is an application in revision asking us to set aside the order of the lower court rejecting an application for review filed by the applicant before it It appears that the applicant instituted a regular suit in the court of the Additional Subordinate Judge of Allahabad for the recovery of certain property on the allegation that he was the son

(1) (1902) I L R 25 All 187 (2) (1905) I L R 28 All 240

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of one Thakur Beni Bahadur Singh The property in suit was at the time in the possession of the Court of Wards, on behalf of a minor The claim was resisted on the ground among others, that notice under section 48 of Local Act No III of 1899, had not been given as prescribed in the Act and that the plaintiff applicant was not the legitimate son of Beni Bahadur Singh Both the pleas in defence were accepted and the claim was dismissed About five months after the dismissal of the claim the applicant filed a petition in the court of the Subordinate Judge under order XLVII rule 1, seeking to review the decree dismissing his claim on the ground of the discovery of new and important evidence on the question of his legitimacy The learned Subordinate Judge issued a notice to the other side to show cause against the application At the time of hearing the learned Judge declined to record evidence on behalf of the applicant and presumably after hearing arguments on both sides, rejected the application He gave two reasons for dismissing the application viz (1) that on the face of it it did not disclose any good ground for review, and (2) that even if the new and important evidence alleged to have been discovered by the applicant were to affect the decision as to his legitimacy, the decree will still stand good on the other issue in the case viz the want of proper notice The applicant has come up to this Court in revision and contends that he should have been allowed an opportunity of producing evidence to make out a case for the granting of his application for review It is said that if he had succeeded in persuading the lower court to accept the new evidence the decision on the question of legitimacy would probably have been modified and given in his favour In that case he would have had an opportunity of coming up in appeal and re opening the question of the want of notice We think that the application for review was rightly rejected The decision on the question of legitimacy on the reception of new evidence would not have modified or set aside the original decree In our opinion the provision relating to review contemplates grounds which would alter or cancel the original decree The application therefore, fails and is rejected with costs

Application rejected

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Mr *A. H C Hamilton* in reply submitted that the Subordinate Judge was bound to consider the application on the merits, and if he had considered the merits of the case and allowed the application for review, a new decree would have followed He *relied on Kanhaiya Lal* v. *Baldeo Prasad* (2)

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(1) (1902) I L R 25 All, 187 (2) (1905) I L R, 28 All 240

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MAHABIR PRASAD v. THE COLLECTOR OF ALLAHABAD

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Application rejected

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March 23.

APPELLATE CIVIL

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

ASGHAR ALI (APPLICANT) v AMINA BEGAM AND OTHERS (OPPOSITE PARTIES).
AND HAMID ALI KHAN (APPLICANT) v AMINA BEGAM AND OTHERS
(OPPOSITE PARTIES) *

Muhammadan law—Act No VIII of 1890 (Guardians and Wards Act) sections 9 and 39—Application for appointment as guardian of minor girl—Qualifications for applicant

Held that the husband of a m nor g rl s s ster is not under the Muhammadan law entitled to be appo nted a guard an of the person or property of the minor

Held also that the Guard ans and Wards Act 1890 contemplates that an applicant for guard ansh p should res de within the jurisd ction of the court to wh ch he makes the appl cat on

THE facts of this case were as follows —

One Abdul Ghafur died some time ago leaving six daughters, namely Anwari, Hasina Abkari Asghari, Masiha and Amina Hasina died after her marriage leaving two children, Aziz ur Rahman and Musammat Habib Fatima Musammat Anwari and the two children of Hasina are minors On the 14th of March, 1913, Asghar Ali applied to the District Judge of Moradabad to be ap pointed guardian of the person and property of the said three minors No one objected to the application of Asghar Ali with regard to the minors Aziz ur Rahman and Musammat Habib Fatima But as regards the application relating to Musammat Anwari Begam her two married sisters, Akbari Begam and Amina Begam filed objections and stated that Musammat Anwari was living then and had all along sin e the death of their mother lived with Musammat Akbari Begam It was further stated in their objection that the personal wishes of the minor Musammat Anwari Begam were that she should be allowed to remain with her sis ter Musammat Akbari Begam It may be noted that Musammat Anwari s date of birth as given in the application of Asghar Ali is June 1898 so that she is now almost 16 years of age On the 23rd of June 1913 Hamid Ali Khan the husband of Musammat Akbari Begam, also applied to be made a guardian of the person and property of Musammat Anwari Both the applications were dismissed by the District Judge and both the applicants appealed to the High Court

* First Appeals Nos 159 and 215 of 1913 from orders of Sa yid Muhammad Ali D str ct Judge of Moradabad dated the 16th of May 1913

Maulvi *Muhammad Ishaq* for the appellants

The Hon'ble Dr *Tej Bahadur Sapru*, for the respondents

MUHAMMAD RAFIQ and PIGGOTT JJ —The two appeals Nos 159 and 215 of 1913 are connected and have arisen out of the following circumstances One Abdul Ghafur died some time ago leaving six daughters namely Anwari Hasina Akbari Asghari, Masiha and Amina Hasina died leaving two children Aziz ur Rahman and Musammat Habib Fatima Musammat Anwari and the two children of Hasina are minors On the 14th of March 1913 Asghar Ali applied to the District Judge of Moradabad to be appointed guardian of the person and property of the said three minors No one objected to the application of Asghar Ali with regard to the minors, Aziz ur Rahman and Musammat Habib Fatima But as regards the application relating to Musammat Anwari Begam her two married sisters Akbari Begam and Amina Begam filed objections and stated that Musammat Anwari was living then and had all along since the death of their mother lived with Musammat Akbari Begam It was further stated in their objection that the personal wishes of the minor, Musammat Anwari Begam, were that she should be allowed to remain with her sister, Musammat Akbari Begam We may note that Musammat Anwari's date of birth as given in the application of Asghar Ali is June 1898 so that she is now almost 16 years of age On the 23rd of June, 1913, Hamid Ali Khan the husband of Musammat Akbari Begam also applied to be made a guardian of the person and property of Musammat Anwari Both the applications were dismissed by the District Judge, and both the applicants have come up to this Court in appeal The appeal of Hamid Ali Khan must fail on the ground that he is not entitled to be appointed a guardian of his sister in law, either of her person or property under the Muhammadan law The appeal of Asghar Ali must also fail, but on another ground He admittedly lives in the district of Meerut, and according to him Musammat Anwari Begam also ordinarily resides with him in that district If so, the application with respect to the guardianship of the person of the minor should have been made to the District Judge of Meerut, and that with respect to the guardianship of the property of the minor either to the District Judge of Meerut or Moradabad. But having

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ASGHAR ALI v AMINA BEGAM

regard to the provisions of section 9 of Act VIII of 1890 the District Judge of Moradabad might very well have refused to entertain that application We might also refer to clause (*h*) of section 39 of the same Act, which shows that the Legislature contemplates that an applicant for guardianship should reside within the jurisdiction of the court to which he makes the application We, therefore, think that the application of Asghar Ali should not have been made to the District Judge of Moradabad We dismiss his appeal But the dismissal of his appeal or the rejection of the application by the District Judge of Moradabad will not stand in his way, if he chooses to make a proper application according to law in a court which has jurisdiction to entertain it As the objection as to the want jurisdiction was not taken by the objectors in the court below we think that the costs in the application of Asghar Ali should be borne by the parties In the case of Hamid Ali Khan we make no order as to costs

Appeal dismissed

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1914 *March* 20

SUBHAG SINGH (OBJECTOR) v RAGHUNANDAN SINGH (APPLICANT) *

Act No VIII of 1890 (Guardians and Wards Act), Chapter II—Appointment of guardian—Procedure—Evidence—Admissibility of qanungo's report as to fitness of applicant

Three persons applied to the District Judge to be appointed guardian of the person and property of a minor The District Judge asked the Collector to say which one of the three persons was the fittest to be appointed guardian A report was called for by the Collector from the girdawar qanungo who reported in favour of the respondent The District Judge thereupon appointed him as guardian of the person and property of the minor

Held that the report of the qanungo could not be treated in law as evidence and that it was the duty of the District Judge to have called upon the different claimants to give evidence and to decide on that evidence

THE District Judge of Ghazipur, having before him three applicants for appointment as guardian of a certain minor, made a reference to the Collector of the district asking him whether he was inclined to take the property of the minor under the management of the Court of Wards, and if not, to say which one of the three persons, viz Raghunandan Singh, Har Shankar

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* First Appeal No 140 of 1913 from an order of Sri Lal, District Judge of Ghazipur, dated the 12th of April, 1913

Singh and Subhag Singh was the fittest person for appointment as guardian of the person and property of the minor. A report was presumably called for by the Collector from the girdawar qanungo who reported in favour of Raghunandan Singh On the receipt of that report and without taking any further evidence in the case, the learned Judge appointed Raghunandan Singh as guardian and rejected the prayers of the other two persons Subhag Singh appealed to the High Court

Mr *M L Agarwala* and Munshi *Harnandan Prasad*, for the appellant

The Hon'ble Dr *Tej Bahadur Sapru* and Pandit *Rama Kant Malaviya*, for the respondent

MUHAMMAD RAFIQ and PIGGOTT, JJ —This is an appeal under Act VIII of 1890 from an order passed by the learned District Judge of Ghazipur, appointing one Raghunandan Singh guardian of the person and property of his minor son in law, named Padam Deo Narain Singh It appears that in addition to Raghunandan Singh there were two other persons who moved the lower court for their appointment, viz Har Shankar Singh and Babu Subhag Singh. Har Shankar Singh described himself as the paternal uncle of the minor. The learned Judge as appears from the serial order, dated the 21st of February, 1913, asked the Collector of the district whether he was inclined to take the property of the minor under the management of the Court of Wards, and if not, to say which one of the three persons, viz Raghunandan Singh, Har Shankar Singh and Subhag Singh was the fittest person for appointment as guardian of the person and property of the minor. A report was presumably called for by the Collector from the girdawar qanungo, who reported in favour of Raghunandan Singh. On the receipt of that report and without taking any further evidence in the case, the learned Judge appointed Raghunandan Singh as guardian and rejected the prayers of the other two persons Subhag Singh has come up in appeal to this Court. He contends that the report of the qanungo cannot be treated in law as evidence in the case and that the learned Judge should have called upon the different claimants to give evidence and should have decided on that evidence We think that this contention is well founded and we therefore, set aside the order of the learned Judge under appeal

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and direct him to dispose of the applications and objections of the three persons named above according to law The costs of this appeal shall abide the event

Appeal allowed

PRIVY COUNCIL.

*P C 1914 February 17 13 March 11

BATUK NATH (DECREE-HOLDER) v MUNNI DEI AND OTHERS (JUDGEMENT DEBTORS)

[On appeal from the High Court of Judicature at Allahabad]

Act No XV of 1877 (Indian Limitation Act) section 4 and schedule II, article 179 clause 2—Limitation—Application for execution of decree—Practice of Privy Council— Order for dismissal for want of prosecution of appeals to Privy Council—Order of 15th June 1853 Rule V—Dismissal of appeal for want of prosecution without order made in the appeal

Under rule V of the Order in Council of 15th June 1853 * where for a period specified in the order the appellant to His Majesty in Council, or his agent has not taken any effectual steps for the prosecution of the appeal, it stands dismissed without further order

Such a dismissal for want of prosecution is not the final decree of an appellate court within the meaning of article 179 clause 2 of schedule II of the Indian Limitation Act, 1877, from which a period of limitation can be reckoned under that article in support of an application for execution of a decree

In this case the application for execution having been made more than three years after the decree of the High Court was therefore barred by lapse of time, and should have been dismissed on that ground under section 4 of the Limitation Act

APPEAL from a judgement and decree (4th June, 1910) of the High Court at Allahabad which affirmed a judgement and decree (8th September, 1908) of the Court of the Subordinate Judge of Agra, made on an application for execution of a decree

* Order in Council, dated 15th June, 1853 Rule V — That a certain time [illegible] agent to make [illegible] at such time be [illegible] transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the cape of Good Hope, or from the territories of [illegible] tters [illegible] and [illegible] prosecution of the appeal within such time or times respectively the appeal shall stand dismissed without further order '

* Present:—Lord SHAW Lord SUMNER Sir JOHN EDGE and Mr AMEER ALI

The appellant was the purchaser of a decree, dated the 29th of March, 1898, made in a suit to enforce a mortgage bond instituted in the court of the Subordinate Judge of Agra against the mortgagor by one Sheo Narain, to which suit the puisne mortgagees the prior mortgagees and the purchasers of the equity of redemption were made parties. The decree was made conditional on Sheo Narain making certain payments to the prior mortgagees within a specified time, in default of which his suit was to stand dismissed with costs Sheo Narain appealed to the High Court against that part of the decree which made it conditional on the payments to the prior mortgagees, but his appeal was dismissed and the decree affirmed on the 12th of February, 1900 The High Court, however, extended the time for making the payments until the 9th of August, 1900 Sheo Narain preferred an appeal to His Majesty in Council, but it was eventually dismissed for default of prosecution on the 15th of December, 1904 Meanwhile Sheo Narain had, on the 26th of September, 1901, assigned the decree to the appellant, who made several applications, which resulted in extensions of time being granted up to the 20th of March, 1902, for making the payments under the decree Any further extension was refused by an order on that date, and a review of that order was rejected on the 7th of June, 1902 The result was that, the appellant having failed to pay the sum due to the prior mortgagees within the time prescribed by the Court, his suit stood dismissed with costs under the terms of the decree

The appellant, on the 2nd of October, 1907, made the present application for a decree absolute under section 89 of the Transfer of Property Act (IV of 1882) and for an order that certain specified properties might be sold in execution of the decree of the 29th of March, 1898

The respondents filed objections, the first of which was that the application for execution was barred by limitation.

The Subordinate Judge held that the application was not barred by limitation, which under article 179 clause 3, of schedule II of the Limitation Act, 1877, began to run from the final decree of the appellate court, which he held to be the dismissal of the appeal by the Privy Council on the 15th of December, 1904 within three years from the present application But he dismissed the

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application on the ground that, the payments to the prior mortgagees not having been made either within the original period or the extended time, the suit stood dismissed under the terms of the decree, and that decision was affirmed by the High Court (KARAMAT HUSAIN and E CHAMIER, JJ.).

In the course of the argument for the appellant on the merits his Lordship Mr. AMEER ALI asked whether the application was not barred by limitation.

De Gruyther, K. C. and *J. M. Parikh* for the appellant contended that it was not barred. The question of limitation was decided by the Subordinate Judge in the appellant's favour on the ground that the period of limitation (three years) began to run from the dismissal of the appeal to His Majesty in Council for want of prosecution, as being the final decree of the appellate court, and that dismissal was within three years of the present application. The District Judge did not notice the question of limitation, but he affirmed the decision of the Subordinate Judge dismissing the application on the merits of the case.

Sir Erle Richards, K. C., and *B. Dube* for the respondents (purchasers of the equity of redemption) contended that the application was barred by limitation. No order in Council dismissing the appeal for want of prosecution had been drawn up or made in the appeal. None indeed was necessary, because, under rule V of the order in Council, dated the 15th of June, 1853, when an appeal has been admitted and nothing has been done under it by the appellant or his agent for a period specified in the order the appeal stands dismissed without further order. There was no decree or order from which limitation could run ; the decree of the High Court was not affirmed by this Board. The three years within which this application should have been made began to run from the 12th of February, 1900, the date of the High Court decree, which was the final order or decree of the appellate court, and even if the extension of time is taken into consideration the application is barred as not having been made within three years.

De Gruyther, K. C., in reply contended that an appeal to His Majesty in Council was not effective before the appeal was lodged. When it is lodged the appeal can be dismissed only by an order in Council. Rule V of the order of the 15th of June, 1853, says the

appeal shall stand dismissed "without *further* order in Council,' that meant, it was submitted that the appeal was automatically dismissed on the expiry of the time stated in the rule by the order in Council of 1853

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1914 March 11th —The judgement of their Lordships was delivered by SIR JOHN EDGE —

This is an appeal from a decree dated the 4th of June 1910, of the High Court of Judicature at Allahabad which dismissed an appeal by the appellant here from a de ree of the Subordinate Judge of Agra dated the 8th of September, 1908, dismissing an application which had been made on the 2nd of October, 1907, to the court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th of March 1898

The decree of the 29th of March 1898 had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act 1882, for sale of certain immovable property By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage debt within five months from the 29th of March, 1898, his suit should stand dismissed with costs From that decree of the 29th of March, 1898 an appeal was brought to the High Court of Judicature at Allahabad That appeal was dismissed by the High Court by its decree of the 12th of February 1900 but in dismissing the appeal the High Court extended the time for payment of the prior mortgage debt to the 9th of August 1900 It has not been alleged or proved that any certified copy of the decree of the 29th of March 1898 was registered within the meaning of article 179 of the second schedule of the Indian Limitation Act 1877 From the decree of the 12th of February 1900 of the High Court an appeal to His Majesty in Council was brought On the 15th of December 1904 the appeal to His Majesty in Council stood dismissed for non prosecution under rule V of the Order in Council of the 13th of June 1853 without further order

On the 26th of September 1901 Sheo Narain had assigned his de ree of the 29th of March 1898 to Babu Batuk Nath During the pendency of the appeal to His Majesty in Council some orders had been made by the court of the Subordinate Judge of Agra

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extending the time for the payment of the prior mortgage debt, but the last application for an extension of time for the payment of the prior mortgage debt which was made to his court was dismissed by the then Subordinate Judge of Agra by his order of the 20th of March, 1902 and on the 7th of June, 1902, the Subordinate Judge dismissed an application for a review of his order of the 20th of March 1902

In making his decree of the 8th of September, 1908, dismissing the application of the 2nd of October 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council that is to say from the 15th of December, 1904, and consequently that the application for execution had been made within time, he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th of March 1898 not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed The attention of the learned Judges of the High Court does not appear to have been drawn to the question of limitation, they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge

It appears to their Lordships that the application of the 2nd of October 1907, was made after the period of limitation prescribed for such an application by article 179 of the second schedule of the Indian Limitation Act 1877, had expired and that the application should in accordance with section 4 of that Act, have been dismissed, unless the dismissal of the 15th of December, 1904 for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal There was, however, no order of His Majesty in Council dismissing the appeal nor was it necessary that any such order should be made in the appeal Under rule V of the Order in Council of the 13th of June, 1853 the appellant or his agent not having taken effectual steps for the prosecution of the appeal, the appeal stood dismissed without further order

As their Lordships hold that the application of the 2nd of October 1907, was barred by limitation and should on that ground have been dismissed they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

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Appeal dismissed.

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for respondents Lala Kishan Lal (16) and Lala Beni Prasad (17): *Barrow Rogers and Nevill.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1914 *February 26.*

KHURSHED HUSAIN (DEFENDANT) v. FAIYAZ HUSAIN (PLAINTIFF) AND FIZZA BEGAM (DEFENDANT).*

Muhammadan law—Shias—Marz ul maut—Disease of more than one year's duration—Gift.

Under the Shia Law a gift made in marz ul maut holds good to the extent of only one third of the donor's estate in spite of delivery of possession prior to his death.

Under the Shia Law if a person dies of a disease of more than one year's duration such disease is not considered a death illness. But there is this condition attached to it that if the illness increases to such an extent as to cause, or another supervenes which causes an apprehension of death in the mind of the donor the increase or the new disease is a death illness. The nature of the gift does not change even if the donor had intended prior to death illness to transfer the property to the donee.

THE facts of this case were as follows:—

One Tajammul Husain was the owner of the properties in dispute. He died on the 8th of July 1911 leaving the plaintiff and defendant No. 1, his brothers, and defendant No. 2 his sister surviving him. Four days before his death he had executed a deed of gift for consideration *(hiba bil ewaz)* in favour of one of his brothers defendant No. 1, and remitted the price. The plaintiff alleged that Tajammul Husain was about 80 years old at the time and was incapable of understanding the nature of the transaction and that he was suffering at the time of the gift from an illness,

* First Appeal No. 377 of 1912 from a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 31st of July, 1912.

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which resulted in his death, and for these reasons he prayed that it might be declared that he was entitled to a share in Tajammul Husain s property

The defendant denied these allegations The court of first instance decreed the suit holding that Tajammul Husain understood the nature of the transaction, that he was in his proper senses but that he was suffering from death illness (*marz-ul maut*) when he executed the gift He therefore declared the deed of gift of the 4th of July 1911 to be ineffectual against the plaintiff to the extent of two thirds and the plaintiff was declared entitled to his two fifths share out of two thirds of the property covered by the gift

The defendant No 1 appealed

Mr *B E O Conor* (with him Maulvi *Muhammad Ishaq*) for the appellant —

Two questions arise in the case (1) Whether on the evidence it *is proved that the deceased executed the document* while suffering from *marz ul-maut*, (2) whether the law of *marz ul maut* applies to the parties who are *Shias* On the first he argued on facts that Tajammul Husain was not suffering from *marz ul maut* He read and commented upon the evidence and submitted that at the most it was a long standing illness Long standing illness becomes a part of a man s nature and he loses all fear of death from it and therefore it does amount to *marz ul maut*

The man was 80 years of age and was suffering from asthma each attack of which weakened his constitution and after the execution of the document he had a bad fit and died probably of heart failure This is the case proved here It is not a case where a man executed the g ft at a time when he was in fear of mpending death The facts proved do not establish *marz ul maut*

The case of *Fatima Bibi* v *Ahmad Baksh* (1) lays down the test of *marz ul maut* In this case there were no increase of illness

Maulvi *Muhammad Ishaq* (following) —

The doctrine of *marz ul-maut* does not apply to Shia law He then cited many original authorities mentioned in the judgement

(1) (1903) I L R, 31 Calc 319 (324)

All the authorities lay down that a gift made in *marz ul maut* by a Shia is valid as to the whole The *Jama ush Shattat* is quite clear upon the point The *Sharaya* which is a book of great authority among the Shias is vague on this question (Ameer Ali, 4th Edition, page 56)

Mr *Agha Haidar* (with him Dr *S M Sulaiman*) for the respondents, was called upon to reply on the question of law only —

The Muhammadan Law puts a limitation on the interest of a dying man He is ceasing to have an interest in wordly matters and the law restricts his right to deal with his property to one third thereof (Ameer Ali, page 56) The law of Shias and Sunnis on the question of *marz ul maut* is practically the same Ameer Ali discusses the law at page 56 where he lays down the general law Certain original authorities together with their translations were then cited, they are mentioned in the judgement The above authorities are the leading authorities on the subject The *Sharaya* is a book of great authority Reference was made to the *Jami ul Rizwi* page 4 and to *Abbas Ali* v *Maya Ram* (1) and *Agha Ali Khan* v *Altaf Husain Khan* (2) The *Mabsut al Masalik* the *Jawahar-ul Kalam* the *Jami ul Makasid* and the *Shara i Lama* are well recognized authorities among the Shias, *Ameer Ali Introduction, pp xxx, xxxi*, *Agha Ali Khan* v *Altaf Husain Khan* (2) These uphold the gift only up to one third The *Jama ush Shattat* is only a collection of certain fatawahs which are of no authority in India The passage read out from the *Ramzat ul-arz* supports the gift to the extent of one third only There is only one case upon the point and that a case of our own Court, *Nazar Ali Khan* v. *Rafeek Husain* (3)

Maulvi *Muhammad Ishaq* in reply —

The *Sharaya* may be a book of great authority but other authorities may also be valuable In 25 Allahabad their Lordships were not considering the respective values of different authorities Mr Ameer Ali has no high opinion of the author of the *Sharaya* (Introduction, p. lv) The *Sharaya* moreover,

(1) (1888) I.L R 12 All 229 (230) (2) (1892) I L.R 14 All. 429 (450)
(3) (1912) 8 A L.J, 1154

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(1) (1888) I L R., 12 All 229 (232) (2) (1892) I L R 14 All. 429 (450)
(3) (1913) 8 A L J, 1154

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governs the Akhbari Shias, and the other side have failed to show that the parties are Akhbaris

TUDBALL and MUHAMMAD RAFIQ, JJ —This appeal arises out of a suit brought by Syed Faiyaz Husain, the plaintiff respondent No 1, to recover his legal share in the estate left by his elder brother, Syed Tajammul Husain

It appears that Tajammul Husain was the eldest of four brothers and one sister One of the brothers, Riaz ud-din, died in the life-time of Tajammul Husain leaving him surviving a son called Nasir ud din The other two brothers and the sister, namely Faiyaz Husain, Khurshed Husain and Musammat Fizza, are still alive

On the 4th of July, 1911, Tajammul Husain executed a deed in respect of the whole of his property in favour of Khurshed Husain The document was written out as a deed of gift, but was prior to its execution altered and described as a sale deed, the consideration of which was remitted by the executant Immediately after the execution of the document an application for mutation of names was made by Khurshed Husain, and the next day, on the 5th of July, 1911, Tajammul Husain was examined on commission and admitted the application of Khurshed Husain Tajammul Husain died four days after, on the 8th of July, 1911

On the 22nd of July, 1911, Faiyaz Husain instituted the suit out of which this appeal has arisen in the court of the Subordinate Judge of Meerut for the recovery of his legal share, *i e*, two fifths in the estate left by Tajammul Husain by cancellation of the deed of the 4th of July, 1911 The suit was brought against Khurshed Husain and Musammat Fizza Faiyaz Husain challenged the deed of the 4th of July, 1911, which he described as a deed of gift, on various grounds He said that Tajammul Husain was at the time in his dotage and had been ill for about two months prior to his death, and because of old age and disease was incapable of transacting or understanding the nature of any business Four days prior to his death, Khurshed Husain, who was on bad terms with the plaintiff (Faiyaz Husain), taking advantage of the latter's absence from Mawana, the village where the parties reside, by the exercise of undue influence and pressure on Tajammul Husain, at a time when he was in a weak state of mind and body and in

terror of impending death and incapable of appreciating the consequences of his act, with no one by him to give him independent advice, got him to execute a deed of gift under the colour of a sale-deed and had it registered in collusion with the Sub Registrar of Mawana There were thus four grounds upon which the deed of the 4th of July, 1911, was impeached, viz, fraud, undue influence, unsoundness of Tajammul Husain's mind and the execution of the deed in contemplation of death Khurshed Husain alone resisted the suit, Musammat Fizza being a *pro formâ* defendant He denied the allegations made in the plaint on the strength of which the deed of the 4th of July, 1911, was questioned He said that some years prior to the death of Tajammul Husain, Nasir ud-din had fallen out with the latter and that the feeling between the two ran high Faiyaz Husain had taken the part of Nasir ud din, while he, Khurshed Husain, had supported Tajammul Husain. The latter was naturally displeased with Faiyaz Husain In order to show his displeasure and also to benefit Khurshed Husain, who had a large family and a small income while Faiyaz Husain had a good income and had only a daughter who was well provided for, being married well, Tajammul Husain executed a sale deed of all his property on the 4th of July, 1911, in his (Khurshed Husain's) favour, the sale price of which Tajammul Husain remitted The latter had made up his mind a year or more prior to his death to transfer all his property to Khurshed Husain, though the actual transfer was made on the 4th of July, 1911 Tajammul Husain had been suffering from asthma for several years prior to his death and had no other illness at the time of the execution of the deed He had an unexpected attack of asthma in a severe form on the 8th of July, 1911, and died suddenly, never expecting himself, and no one else expecting, his death It was further pleaded in defence that, even if Tajammul Husain be said to have executed the deed in question in *marz ul maut* (death illness) it is not invalid, partially or wholly under the Shia law, by which the parties, being Shias, are governed, as possession had been delivered by the donor prior to his death The learned Subordinate Judge after a careful consideration of the evidence in the case, found the allegation of fraud, undue influence and unsoundness of Tajammul Husain's mind baseless He however, held that the

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deed executed by Tajammul Husain was a deed of gift and that it was executed in *marz-ul-maut* (death illness) He further held that under the law, the deed was operative only to the extent of one third of the donor's estate A decree for two fifths out of two thirds of the estate of Tajammul Husain was accordingly passed in favour of the plaintiff Faiyaz Husain Khurshed Husain has come up in appeal to this Court The character of the deed is not disputed before us The argument for the defendant appellant has proceeded on the admission that it is a deed of gift He challenges the decree of the lower court on two grounds one of fact and the other of law He denies that the deed of the 4th of July 1911 was executed during *marz ul maut* (death illness) or if it was executed during *marz ul-maut* it is invalid partially under the Shia Law He contends that the *onus* of proving the character of the disease of Tajammul Husain which would according to the plaintiff respondent, vitiate the deed in part lay upon the latter which has not been discharged On the contrary the evidence for the defendant appellant proves that Tajammul Husain died of a long standing complaint more than a year old by a sudden and unexpected attack of it, and under the Shia law a disease more than a year old is not considered *marz ul maut* The case of *Fatima Bibi* v *Ahmad Bakhsh* (1) is relied upon in support of the contention that a disease that lasts more than a year cannot be described as *marz ul maut* (death illness)

The defendant appellant relies upon passages from nineteen writers on Shia Law in support of his said contention that a deed of gift executed during *marz ul maut* is valid with regard to the whole of the property of the donor provided possession is given by the latter prior to his death

We take up the question of fact first But before considering the evidence on the point it may be conceded that the *onus* of proving the character of the disease lay upon the plaintiff respondent It may also be conceded that under the Shia law, if a person dies of a disease of more than one year's duration such disease is not considered a death illness But there is this condition attached to it that if the illness increases to such an extent as

(1) (1903) I L R 31 Calc 319

to give or another supervenes which gives an apprehension of death in the mind of the donor the increase or the new disease is a death illness

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[After discussing the evidence the judgement proceeded]

We therefore hold that the gift in favour of the defendant appellant was made by Tajammul Husain in *marz ul-maut* (death illness)

One more argument remains to be considered in connection with this point It is urged on behalf of the defendant appellant that he has proved both by oral and documentary evidence, that Tajammul Husain had intended from a year or more prior to his death to give all his property to the former It was merely an accident that the gift was made by him during his death illness The argument assumes that a gift made during *marz ul-maut* is not invalid if the donor intended to make it or thought about it before his last illness The argument does not relate so much to the question of fact under discussion viz the character of Tajammul Husain s disease as to a question of law viz the validity of a gift made during death illness which the donor had thought of making from before such illness No authority has been cited in support of this contention Besides it appears that it was not so much to benefit the defendant appellant as to show his resentment to the plaintiff respondent that Tajammul Husain wanted to give away all his property to the defendant appellant, and he was not going to and did not part with his property in his life time and place himself at the mercy of his brother He made up his mind and carried out his intention when he was in his last illness and despaired of his life Under such circumstances whatever intention he had prior to his death illness would not affect the character of the gift It would still remain a gift made during *marz ul maut* (death illness)

We now proceed to consider the second point raised in this appeal viz whether a gift made in *marz ul maut* (death illness) is valid with regard to the whole of the property of the donor in case of the delivery of possession to the donee prior to the donor s death The question raised by the defendant appellant is not free from difficulty The difficulty is due not to the absence of any definite opinion on the point, but to the diversity of opinion

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among the Shia jurists One group of eminent Shia doctors would maintain the gift in respect of the whole of the donor's estate, while the other, equally high in learning and authority, would have it that a gift made in *marz ul maut* is valid to the extent of one third only of the estate of the donor in spite of the delivery of possession prior to his death The different opinions and the reasons in support of each will appear from the passages relied upon by the parties, which will be referred to presently The defendant appellant has cited nineteen authorities in support of his contention They are as follows —

(1) Kifayat ul Ahkam, (2) Ar Rauz ul Ariz, (3) Majma ul Masail, (4) Maqama (5) Minhaj ul Idia, (6) Hadaiq i nazaira, (7) Nihaya, (8) Khilaf ush Shaikh (of Tusi), (9) Nikat un nihaya, (10) Shara i-Lama (11) Jawahar ul Kalam, (12) Khilaf ush Shaikh (of Suduq), (13) Riaz ul Masail, (14) Burhan i qata, (15) Maqnea Mufid (16) Hadaiq i Bahrani, (17) Jama ush Shattat, (18) Intesar and (19) Ghunnia

Of these the first four are said to have been written within the last twenty five years, Nos 1, 3 and 4 being by Persian authors The author of Ar Rauz ul Ariz was Saiyid Allan Sahib, a member of one of the *mujtahid* families of Lucknow The authority of these four books is disputed by the plaintiff respondent and there is nothing to show what weight is to be attached to them In any case they cannot rank as high as the other authorities cited by the appellant or those relied upon by the respondent We will not, therefore, discuss them We would, however, remark that the author of Majma ul Masail is against the contention of the defendant appellant, but a marginal note by one Saiyid Kazim, who is said to be a *mujtahid in najaf* at present is to the effect that the stronger opinion is in favour of the gift holding good in respect of the whole of the donor's estate The author of Ar-Rauz ul Ariz, after giving the two opinions on the point and accepting the view contended for by the defendant appellant, however, remarks that "it is safer that the gift should receive effect to the extent of one-third according to the traditions and the better views" The appellant is unable to say who was the author of Minhaj ul Idia. We cannot, therefore, say what weight it carries among the Shias, and we, therefore, leave it out of account

As to Hadaiq i nazaira, the passage relied upon is not quite explicit and we, therefore, do not discuss it Of the remaining thirteen books, Shara i Lama and Jawahar ul Kalam do not support the case of the defendant appellant Indeed, on the contrary, they are against him Those passages have been cited by the defendant appellant from Shara i Lama and Jawahar ul Kalam where opinions of other writers are given The authors of Shara i Lama and Jawahar ul Kalam uphold the gift in respect of only one third of the donor's estate, as will be shown later in this judgement It is, therefore, unnecessary to reproduce the passages referred to by the defendant appellant The Nihaya and the Khilaf us Shaikh of Abu Jafar Tusi and the Nikat un Nihaya of Abul Kasim, the famous author of the Sharaya, need not also be referred to, as both Tusi and Abul Kasim in their later books, the Mabsut and the Sharaya, retracted their first opinion and gave the Fatwa that a gift made in *marz ul maut* held good to the extent of one third only of the donor's estate in spite of the delivery of possession to the donee by the donor prior to his death Both the Mabsut and the Sharaya will be referred to presently

There now remain eight books, viz.

(1) Maqnea Mufid of Shaikh Mufid, (2) Khilaf ush Shaikh of Saduq (3) Hadaiq i Bahrani, (4) Intesar, (5) Ghunnia, (6) Burhan i Qata, (7) Jama ush Shattat and (8) Riaz ul Masail

Some of these books are undoubtedly of great authority, having been composed by some of the most eminent Shia jurists Chief among them being the author of Maqnea, viz. Shaikh Muhammad Ibn Muhammad Ibn Al Numani Abu Abdullah surnamed 'Al mufid' because of his numerous pupils He says in Maqnea, that "if a gift is made during illness or a sadaqa is made it is valid to the extent of the whole of the property and no one has a right to interfere with it Sale in illness is valid like gift and sadaqa if a man is of sound mind and is capable of forming his own opinion but if the illness has affected his reasoning faculty and interfered with his judgement, only those acts which are for the sake of virtue and piety are valid and all other acts are invalid." It will be seen that this passage merely gives the opinion of the author and gives no reason in support of it. Saduq in Khilaf ush Shaikh, on the other hand, admits that there are two

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opinions among the Shia lawyers and accepts the view that a gift is valid in respect of the whole of the donor s estate He says as follows — The lawyers are unanimous that a disposition by a sick person exceeding one third of his property is invalid if this disposition is not to have immediate operation If the act is to have immediate operation as manumission gift and connivance at loss in contracts of exchange there are among us two opinions one of which is that it is valid and the other that it is invalid The latter is the view of Shafai and all the jurists (Sunnis) They do not mention any difference of opinion Our arguments for the first opinion are the traditions prevalent according to the narration of our Ulamas which we have mentioned in our book (Kitab ul Kabir) It should be observed here that Saduq held the contrary view at one time as is mentioned by other writers but it is not quite clear which was his latest dictum.

The learned author of Hadaiq i Bahrani in addition to admitting the diversity of opinion on the point admits that the question is not free from doubt and difficulty but he upholds the gift in respect of the whole of the donor s estate

Shaikh Syed Murtaza surnamed Al Huda a pupil of Shaikh Mufid and Ibn i Zohra the authors of Intesar and Ghunnia are also of the same opinion Ibn i Zohra bases his opinion on the *Ijmaa* or the consensus of opinion of the doctors and Al Huda on the *Ijmaa* or consensus of opinion and on the principle that a sane man has a right to dispose of his property as he chooses The relevant passages from Intesar and Ghunnia are as follows —

' The Imamia jurists are divided with regard to the doctrine that if a man makes the gift of a thing during his death illness while of sound mind and capable of forming a rational judgement it is valid and covers not one-third but the whole of his property, while other Non Imamia jurists differ on this point They say that a gift made during death illness applies to one third of the property The arguments of the Imamias are *Ijmaa* and the fact that the appropriation of his property by a man of sound mind is valid and the heirs have nothing to do with his property so long as he is alive Hence the gift made by him is valid and for this very reason it is lawful for him to spend all he possesses in

maintaining himself and there is no difference of opinion of the jurists (on this point)" (Intesar)

"A gift made in death illness will apply to the whole and not to one third of the property on the ground of *Ijmaa* such a gift will not be tantamount to a will A gift made (by a person) in death illness is enforceable and during his life time his heirs have no thing to do with his property A will takes effect after the death of a person and the heirs acquire right in the property after his death and so a will is applicable to one third' (Ghunnia)

Jama ush Shattat also supports the view advanced by the defendant appellant No reasons in support of the opinion enunciated in the book are given The book is a collection of dicta and decisions of the leading *Mujtahids* of Teheran in Persia within the last contrary The passages relied upon by the defendant appellant are given at length in Mr Ameer Ali s Book on Muhammadin Law Vol I, pages 54 to 56 They need not be reproduced here The author of Burhan i Qata is also in favour of upholding the gift in respect of the whole of the donor's estate He says that the contrary opinion is ascribed to the latter generation of Ulamas and was held by Allama Hilli and the author of Sharaya He mentions the names of the lawyers who are in favour of the doctrine of the whole but admits that consensus of opinion cannot be claimed for either view He uses the word *mutraddid* about the consensus of opinion, which means that it cannot be said with certainty that the consensus of opinion is one way or the other. The passage dealing with the point under discussion is as follows —

'At all events, the opinion that such a gift will take effect against one third is ascribed to the general opinion of the later generation of (Ulamas) If this ascription be true it is due to the dicta of the two Fazils (Allama Hilli and Sahib i Sharaya) and of those who followed them in spite of the fact that two of them have either dissented from or hesitated in this dictum at places in the books Sharaya, Irshad, Ghayat ul Murad and Masalik The other opinion is apparent from the views of Kulaini in 'Kafi', Saduq in 'Faqih" Mufid in 'Maqnea", Sayed in "Intesar", Shaikh in 'Tahzib Istibsar Nihaya' and "Khilaf' at different places. This is also apparent from Sarair' Mohazzab 'Wasila", 'Ghunnia" 'Jama ush Sharaya', 'Kashfur-Rumooz", "Majma ul

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Burhan, 'Wasail', 'Kifaya", "Wafi" and "Riaz" And this is the general opinion of the early generation of Ulamas, as has been stated by many and it has been supported by the fact that it has been followed In 'Intesar' the consensus of opinion is claimed for this view. He says — The doctrine that if any person of sound mind and judgement makes a gift in death bed illness such gift will be valid and will take effect not only against one third, but against the whole of his property, is exclusively held by Imamia jurists All the other jurists (Sunnis) have differed and have gone to hold that a gift in death bed illness takes effect against one third Our view is that this consensus of opinion is doubtful'

But the best exposition of the view that a gift holds good in respect of the whole of the donor's estate is perhaps to be found in Riaz ul Masail We give the relevant passage below —

"The dispositions of a sick person if contingent upon death which are considered as a will take effect against a third even though the heirs do not consent, as has been narrated, and its reasons have been hinted If those dispositions are prompt and are not contingent upon it (the death) and in them are the sale at a lower or purchase at a higher price than the actual value, pure gift waqf manumission or sadaqah, then there are two opinions Among the later generation of Ulamas the more current and the better of the two is that they take effect against a third which is in agreement with the view of Iskafi and as is said with one opinion of Saduq Perhaps he (Saduq) has taken this view in his work *other than Faqih as will appear from his adopting the* other view in it (Faqih) And it has been said that this view is apparent from Khilaf and is expressly stated in Mabsut But the passage of Mabsut quoted in Sarair does not support this For he (the author of Mabsut) has said that manumission in dangerous illness according to some of our doctors takes effect against the whole and according to the others aginst one third, which is the view of our opponents (Sunnis), then he (the author of Mabsut) says that if this view be established and some be liberated it will be seen what he has said at the end And this passage as you will see is not explicit in showing that he has adopted this view, *rather this is not even inferred from it* Rather on many occasions he (the author of Mabsut) has shown hesitation on

account of the well known traditions which are between express and evident in their significance in which are authentic and trustworthy and other traditions, some of which fall short on account of their authenticity while others on account of their import which short coming is made good by the repute in the later generation But this view is against Nihaya Muqnea Qazi and Saduq in Faqih and Kulaini in Kafi for they (the two last mentioned) have said that the owner of property has the best right to it as long as he is alive and then have mentioned the traditions relating to it specifically and have not mentioned other traditions relating to the other view All this is expressed as to their view on the point Helli Murtaza and Ibn Zohra have given effect to it as against the whole and as is apparent this had repute in early Ulamas, rather there is no doubt about its being so The two Syeds have claimed in their discussion of the gift that the consensus of Imamias is on this view and in Sarair it is mentioned as the most evident view of the Imamia sect on account of its repute none the less on account of other well known traditions, amongst which are authentic and trustworthy and others which also are between express and evident in their import The point is a difficult and doubtful one on account of the conflict of traditions and because the best of them accept the interpretation which can be used in favour of the other views the points of preference and the reliable argument being on both sides But the preference is for the latter traditions (viz of the whole) on account of their being supported by the established principle and the repute in early Ulamas which is preferable to the repute among latter Ulamas on account of there being a conflict between the two (opinions) as in the question relating to *Ijmaat* (consensus of opinion) which are narrated and because of most of them not accepting the interpretation which can be used in favour of the former view (of the one third) and their being opposed to common people (Sunnis) The opinion which is in conformity with the first traditions is the opinion of all their jurists as is apparent from Intesar Mabsut Sarair Ghunnia and Tazkera So adopting the other view (viz that it takes effect as against the whole) is more reliable The rest say that (it will take effect) against one third And this is the view adopted by the opponents (Sunnis) This

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view which is in harmony with first tradition, is the general view of their jurists, as appears from the clear wordings of Intesar, Mabsut, Sarair, Ghunnia and Tazkera. These traditions should be treated and based upon *takayya* as is supported by the views of Iskafi which thou hast learnt more than once."

Now it is evident from this passage that the learned author of Riaz admits that there are two opinions on the point under discussion; that the point is not free from difficulty and doubt; that there are good reliable traditions in favour of both the views, and that the better opinion among the later generation of Ulamas is in favour of the gift holding good in respect of one-third only of the donor's estate. But he favours the opposite view on the grounds that it was the view of the earlier lawyers; that the traditions in support of it are on the whole more preferable, and that the common people, i.e., the Sunnis, hold the contrary view. He appreciated the necessity of explaining the dicta of some of the early and most eminent Shia doctors who had pronounced in favour of the doctrine of one-third. He gets over the difficulty by saying that they gave the dicta under *takayya* (i.e., under mental reservation) to avoid persecution at the hands of the Sunnis (who were in power then). Briefly put, the reasons to be gathered from the authorities quoted above in support of the validity of a gift in respect of the whole of the donor's estate, appear to us to be these :—Ijmaa or consensus of opinion of the doctors; right of a sane man to dispose of his property as he chooses; early Ulamas in favour of this view, more preferable tradition in support of it and that the common people, i.e., the Sunnis, oppose it.

Now we will refer to other Shia jurists of equal eminence who have directly controverted all those reasons except those based on sectarian grounds, which they have met by implication. Shaikh Muhammad Husain and Najafi the learned author of Jawahar-ul Kalam contradict the statement made in Riaz-ul-Masail that those early Ulamas who gave their decision in favour of one-third did so under *takayya*. He says that "the most curious thing is to ascribe these numerous texts (or explicit dicta) to *takayya*, the non-existence of which, in addition to the fact that some of these dicta are incapable of it, may be believed in respect of the texts like these, among the relators of which are

confidential personages Nay, those who are conversant with the traditional sayings of the doctors (may God bless them) know that it is customary with them (the doctors) in the passages based on *takayya* to hint at it (*takayya*) by using the word *nas* (people) or some similar expression Further, the non existence of *takayya* is believed as certain in this particular place For if this doctrine of ours were contrary to the view of the Aamma (the Sunnis) there would have been in these texts a hint at the dissension from them at the exposition of the invalidity of their views and at their being against the *Kitab* and *sunnat* as is the custom of our doctors (to throw such hints) Nay this (their being based on *takayya*) would have been well known among their disciples, as in the case of other weighty doctrines of general use Besides these there are other reasons which show that the texts are not based on *takayya* '

Shaikh Muhammad Husain further says that the early Ulamas and the best traditions as also the consensus of opinion are in favour of validating the gift in respect of one-third only and not in respect of the whole, as stated in Riaz The relevant passage is as follows — "But despite all this the best opinion is that there is prohibition against a gratuity exceeding the third So it will not operate against the heirs except by their permission This is the unanimous opinion of Fazil Shahidain Kurki and what has been related from Saduq Abi Ali and Shaikh in Mabsut and what has been related from others Nay many persons have attributed this opinion to the modern jurists in general and in Masalik it has even been attributed to the majority of the jurists and all the moderns Again what has been repeatedly related by Shaikh in the chapter of emancipation shows that this is the opinion widely known among us In Mafatih it is given that the traditions about it are most numerous and wide spread It is given in Jami ul Makasid that it is supported by the best traditional authority And in another place in the same book it is mentioned that explicit 'dicta of public and universal notoriety support the opinion And this amounts to a consensus of opinion'

It is thus clear that three of the reasons advanced by the writers quoted on behalf of the defendant appellant in support of the view that the gift holds good in respect of the whole of the

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donor's estate, viz, *Ijmaa*, or consensus of opinion, earlier Ulamas favouring that view and better traditions supporting it, are disputed Both sides claim consensus of opinion and the authority of early writers and traditions in support of their respective views The fact seems to be that traditions of equal weight can be found in support of either view, and that the earlier lawyers are divided on the point just as the modern are Even the learned author of Riaz admits that there is doubt as to the *Ijmaa* or consensus of opinion The explanation of the author of Riaz that some of the early writers who favour the contrary Fatwa did so under *takayya* has also been shown to be unfounded by the author of Jawahar ul Kalam There remain then two reasons, viz, the principle that a sane man has a right to dispose of his property as he chooses "as long as the soul is in his body" and secondly, the sectarian reason, that is, that the Sunnis uphold the gift in respect of one third of the donor's estate The obvious reply to both the reasons is "why is a bequest held to be valid in respect of one third only of the estate of the testator?" The Sunnis hold the same doctrine And when a man makes a gift in his last moments and delivers possession he has no more interest left in the property and cannot enjoy it any more His act really amounts to a bequest The delivery of possession by the donor shortly before his death does not make any difference, for the object both in the case of such a gift and in that of a bequest is to defeat the heirs without in any way affecting the donor or the testator The principle that a sane man has absolute right over his property and can dispose of it as he chooses must be qualified in the case of a gift made in *marz ul maut* in respect of the whole of the donor's estate, though attended with possession, by the same consideration as a bequest is qualified in respect of the whole of the testator's property It was on this consideration that Shahid Sani, Sheikh Muhammad Husain and Najafi Sheikh Najm ud din, Abul Kasim, Jaffar Ali Abu Yahya, surnamed "Al Mohakkik" the learned and widely known author of the Sharaya and Sheikh Muhammad Ali Hasan Ibn Ali Abu Jaffar Tusi surnamed the 'Sheikh of the Imamite faith" in their books and other jurists pronounced in favour of the view that a gift made in *marz ul-maut* held good to the extent of one-third only of the donor's estate, in spite of the delivery of possession

in his life-time. We quote some of them below. Tusi in 'Mabsut' the most important and most erudite of all his books (according to Mr. Ameer Ali, Vol. I, page 30), says as follows :—

"I have already mentioned that a gratuitous act is of two kinds, Munajjaza (of immediate operation) and Muakhkhara (deferred till death). The Muakhkhara is one in which a man makes a bequest for the emancipation of a slave or bequests for Mahabat or Sadaqa, for it becomes binding on death. When a person performs Mahabat sale or emancipates or makes a *gift* and *himself delivers* possession *it is called Munajjaza. The whole of this is* Munajjaza gift. Then it will be further observed if the gratuitous act takes place in a state of health or a disease which is not dangerous it will be enforceable in respect of his entire estate. But if it takes place in a dangerous illness, it will operate in respect of one-third."

The statement in Riaz that Mabsut contains a passage in favour of the doctrine of the whole was made on the *authority of* Sarair. The author of Sarair must have misquoted Mabsut. Shara-i-Lama, a book of high and undoubted authority, has the following passage :—"And a sick man is prohibited from making a disposal of what exceeds the 'third' when he makes a gratuitous disposal; but when he takes in return for it an adequate price, it (the disposal of more than the third) shall be effective. Even though he gives immediate effect to what he does gratuitously in his illness, for example, he makes a gift of it or wills it or gives it by way of charity or remits consideration in sale or lease." "This is the strongest opinion, because of numerous traditional authorities supporting it, some expressly and some by implication. If he makes a gift, waqf or *sadaqa* in his death-illness it shall take effect to the extent of one-third according to the more sound of the two dicta unless the heirs permit it." These two passages from Shara-i-Lama are from the 'Chapters on Prohibition' and Gift, pages 344 and 246 respectively.

Shahid Sani in Masalik says as follows :—"The other (opinion) is that they (such transactions) shall take effect to the extent of the third. This opinion is held by a party of the ancients, one of them being Sheikh Saduq according to one of his two dicta, and this is the opinion approved of by

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the modern jurists in general one of them being the author himself And this is the strongest view because of the numerous explicit dicta supporting it some by implication and some expressly

Sheikh Muhammad Husain an Najafi gives his opinion in Jawa har ul Kalam in no uncertain words His opinion is as follows —

It has now become known to you by Gods grace that it is impossible to say that it (a transfer without consideration) takes effect to the extent of (the) whole, and verily it is not proper for any jurist to go against the principle of one third

What the learned Riaz has written on this subject is very wonderful He has said that in his early period he compiled a brochure on this subject where he approved of the principle of one third but at that time he was not aware of the consensus of opinions of both Murtaza and Ibn i Zohra and he afterwards turned from it (his first view) The fact is that he did not know that the ancients have differed from them and it is also not established that the majority of the ancients have held their views Likewise some of those of whom it is related that they held the first view, as for instance, Ali Hamza I have shown in his description positively that he held the contrary view There are some about whom different sayings are related on this subject and there are others in whose books there is nothing clear, as for instance Kulaini who has prefaced his chapter with the word of (*nusus aumma*) about which it has already been described that it is not clear on the point You have already known that about S aikh it is related that he has said what is known among ourselves during this age is the principle of one third This decides the whole question

Al Mohakkik also is to the same effect —

A patient is prohibited from bequeathing more than one-third according to all unless the heirs permit it But as regards his prohibition against gratuities of immediate operation exceeding the third there is a conflict of opinions between us But the best opinion is that there is prohibition

On the other hand if a waqf is made during the death illness (it is valid) if allowed by the heirs otherwise it is valid only to the extent of one third like gift and sale without consideration It is said that it (waqf) takes effect to the extent of the entire assets

But the first view is the most correct If a person makes a waqf or a gift or manumits (a slave) or sells (a property) and remits the sale consideration and the heirs do not permit then it is valid only if the subject matter does not exceed the limit of one third On the other hand if it exceeds one third the waqf will operate from the first till the limit of one third is rea hed and as regards the rest it becomes void

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It is clear from these authorities that some of the most eminent *Shia jurists uphold a gift made in mar ul maut in respect of* one-third only of the donor s estate in spite of the delivery of possession to the donees before the death of the donor But it is urged for the defendant appellant that the books relied upon by him are of higher authority and in any case his view is supported by just as great do tors as those who hold the contrary view and there is no reason why his contention should not be allowed We do not think that it can be said or at least no authority has been referred to to enable us to hold that the opinions of the jurists quoted for the defendant appellant carry more weight than the dicta of those relied upon by the plaintiff respondent But it must be conceded that the defendant appellant has just as good authority in support of his view as the plaintiff respondent has if reliance is to be placed on early writers But the majority of the modern lawyers modern as compared with early writers are undoubtedly in favour of upholding the gift in respect of one third of the donor s estate We have therefore to choose between the two We think that the Shia doctors who support the view of the plaintiff respon dent are preferable and for two reasons first because the reasons given by them appear to us to be more sound and consistent with the generally accepted principle that the heirs are not to be defeat ed by a disposition which does not in reality affe t the person who has made the disposition The second reason is *that* the opinion of the learned author of the Sharaya must carry greater weight than the opinion of other Shia jurists as he has been held by the courts in this country from early times as the chief authority on the law of the Shias In support of the fact that the Sharaya has been considered the leading book for the laws of the Shias we quote two passages from Morley s Digest and Shama Charan Sircar s Tagore Law Lectures of 1874 Morley in his Digest at

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page cclxxvii says as follows —"The most generally known of all the Shia lawyers is the Shaikh Najm ud-din Abu al Qasim. Jafar Ben Muayyid al Hilli, commonly called the Shaikh Muayyid He died in A H 676 (A D 1277) His great work, the Sharaya ul Islam is more universally referred to than any other Shia law book and is the chief authority for the law of the Indian followers of Ali '

Shama Charan Sircar in his Tagore Law Lectures for 1874 says as follows —' As to the authority of the Sharaya the Sharaya ul Islam written by Shaikh Najm ud din Abu al Qasim Jafar Ben Muayyid al Hilli, commonly called Shaikh Muayyid is a work of the highest authority at least in India, and is more universally referred to than any other Shia law book and is the chief authority for the law of the Shias of India

We, therefore, hold that under the Shia Law a gift made in *marz ul maut* (death illness) holds good to the extent of only one third of the donor s estate in spite of the delivery of possession prior to his death

The result of our findings on the two points raised in the appeal is that the appeal fails We dismiss it with costs

Appeal dismissed

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February 27

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji

JAMNA DAS AND OTHERS (DEFENDANTS) *v* UMA SHANKAR (PLAINTIFF) AND LAL MUHAMMAD AND ANOTHER (DEFENDANTS)*

Act No IV of 1882 (Transfer of Property Act) section 41—Ostensible owner—Finding as to question of fact—Second appeal

Held that the questions whether a person in apparent possession of immovable property is the ' ostensible owner with the consent express or implied of the real owner within the meaning of section 41 of the Transfer of Property Act 1882 and whether a transferee from such a person took the transfer *bond fide* after taking reasonable care to ascertain the title of his transferor, are questions of fact, the finding on which by the lower appellate court cannot be disturbed in second appeal.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court The facts of the case are set forth in the judgement under appeal which was as follows —

* Appeal No 94 of 1913 under section 10 of the Letters Patent

"This is a suit on a simple mortgage executed on the 13th of November, 1907, by Lal Muhammad. The suit is defended by the mortgagees under a second mortgage of the same property executed by Lal Muhammad and his wife Zahuran, in February, 1908. Money was left with the mortgagees under this deed to pay off the prior mortgage in suit but the mortgagees did not pay it, but brought a suit on their mortgage without impleading the plaintiff, the prior mortgagee. The court of first instance decreed the suit, holding that Lal Muhammad was the *de facto* owner of the property and that, even if he was not, section 41 of the Transfer of Property Act applied. The lower appellate court reversed the decree on the ground that the real owners of the property were not Lal Muhammad, but his father in law, Muhammad Bakhsh, and after him his wife, Zahuran, and that section 41 did not apply. The plaintiff comes here in second appeal. As regards the first point, viz, who was the real owner of the property, I prefer the finding of the court of first instance. Muhammad Bakhsh, Zahuran and Lal Muhammad had none of them originally any real title to the property. They were trespassers, but acquired a right by more than twelve years adverse possession. Muhammad Bakhsh held the property for many years. He took Zahuran, his daughter, and Lal Muhammad, her husband, to live with him and long after his death these two lived in the house. I think it might very fairly be argued that they were in adverse possession jointly after the death of Muhammad Bakhsh. I do not however, think it is necessary to discuss the question, as in my opinion, section 41 of the Transfer of Property Act clearly applies. The lower appellate court is of opinion that in realizing rents &c., Lal Muhammad did not act as owner of the house but merely acted as agent for his wife and that the least inquiry would have made the plaintiff aware of the real facts. I am unable to agree with this view. The original rightful owner of the house sued Lal Muhammad for possession. I cannot find any of the papers relating to that suit in the record but it is not denied that Lal Muhammad defended that suit and was found to be entitled to it owing to his adverse possession for more than twelve years. He may have raised the plea that his wife was the real owner, but it does not appear that he was exempted from the suit. The fact that the rightful owner brought the suit against Lal Muhammad shows pretty clearly that he was regarded by the public as the ostensible owner. Lal Muhammad alone executed the deed in suit and no sort of objection was raised by Zahuran. In the deed executed in favour of the respondent, even she does not repudiate the loan, but professes to leave money with the mortgagees for its satisfaction, though it seems very doubtful whether she ever intended that it should be satisfied. I do not agree with the lower appellate court that plaintiff could have easily ascertained the true facts had he cared to inquire. Lal Muhammad was in possession of the house dealing with it as owner, he had been sued by the person originally entitled to it and had won the case. Was the plaintiff bound to push the inquiries as to what happened years before that and to ascertain whether it was Muhammad Bakhsh or Lal Muhammad who originally obtained adverse possession? I think not. It is not disputed that the respondents claim through Zahuran, and that if she is bound by section 41 they are bound also.

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"In my opinion the plaintiff is entitled to a mortgage decree and I, therefore, set aside the decree of the lower appellate court and restore that of the court of first instance The plaintiff does not now wish to put to sale more than one third of the property and the decree will, therefore, relate to that share only

"The plaintiff will receive costs in all courts The appellant undertakes to make good the deficiency in court fees and that amount will be added to the costs"

The defendant appealed

Mr *M L Agarwala*, for the appellant, contended that as the lower court had found that the plaintiff was not entitled to the benefit of section 41 the learned Judge of this Court in second appeal could not go behind that finding

Babu *Piari Lal Banerji*, for the respondent, urged that questions of adverse possession acquiescence and estoppel were questions of law and the conclusion arrived at by the lower appellate court from the facts established or admitted was one which could be considered in second appeal. Upon the facts it was clear that Musammat Zahuran allowed her husband to hold himself out as the ostensible owner of the property, and even now she did not assert any claim inconsistent therewith She admitted the force of the estoppel against her and admitted it in the deed through which the defendant claimed The defendant as a representative in interest of Zahuran was bound by the estoppel which bound her He could not question the title of Lal Muhammad when his mortgagor, Zahuran did not dispute it and admitted it in so many words in the mortgage deed which is the defendant's title

Mr *M L Agarwala*, was not heard in reply

RICHARDS, C J, and BANERJI, J —This appeal arises out of a suit on foot of a mortgage executed by one Lal Muhammad on the 13th of November, 1907 The suit was defended by persons who claimed under a mortgage made in 1908 by Lal Muhammad and his wife, Zahuran They allege that Lal Muhammad had no interest in the property The facts are practically admitted One Muhammad Bakhsh entered into possession of the property adversely to the real owner He had a daughter of the name of Zahuran who married Lal Muhammad These persons, and probably other members of the family of Muhammad Bakhsh, continued in possession of the property until Muhammad Bakhsh died.

After his death Lal Muhammad and his wife Musammat Zahuran continued in possession No doubt the property was managed by Lal Muhammad after the death of his father in law In the mortgage in favour of the defendant it is stated that the property was inherited by Musammat Zahuran from her father There is also a statement that the executant No 2 was in proprietary possession. Whether this was a mistake or not is not very clear, but the two statements are not consistent The lower appellate court found that Lal Muhammad was only managing the property on behalf of his wife, furthermore, that had the plaintiff made the least inquiry, he would have found that Lal Muhammad had no title whatever We may mention here one more fact connected with the mortgage in favour of the defendants In the mortgage deed the mortgage now sued upon was mentioned, and it was also mentioned that money was left in the hands of the mortgagees to pay off the amount of that mortgage The defendants appellants who were the subsequent mortgagees did not pay off the amount of the mortgage for the following reason A suit was brought by a son of Muhammad Bakhsh, and he obtained a decree for two thirds of the property They considered that under these circumstances they were not bound to pay off the mortgages, but gave credit for the amount against their own mortgage and sued to realize the balance which they had actually advanced Under these circumstances the lower appellate court dismissed the suit as against the mortgaged property, but gave a simple money decree against Lal Muhammad. On appeal to this Court a learned Judge reversed the decree of the lower appellate court and restored the decree of the court of first instance which had given a decree for the sale of the mortgaged property

In our opinion the decree of the lower appellate court must be restored We consider that under the circumstances of the present case the property must be deemed to have become the property of Muhammad Bakhsh, and after his death passed to his heirs Lal Muhammad had no title of any kind The suggestion whether Lal Muhammad was the ostensible owner of the property with the consent, express or implied, of the heirs of Muhammad Bakhsh, and the further question whether the plaintiff in the present case *bonâ fide* took the transfer after taking reasonable care to ascertain

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the title of Lal Muhammad, were questions of fact to be decided by the lower appellate court This Court is bound by the findings of fact of the lower appellate court in second appeal and cannot go behind them, whether it approves of the finding or not We must therefore, take it that Lal Muhammad was not the ostensible owner within the meaning of section 41 of the Transfer of Property Act We have already stated that in our opinion as a matter of law he had acquired no interest in the property by reason of the fact that he had lived with his father in law, Muhammad Bakhsh This being so, no interest of any kind passed to the plaintiff under the mortgage of the 13th of November, 1907, and his suit, so far as it sought a sale of the mortgaged property was rightly dismissed We allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court

Appeal allowed

1914
March, 9

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

ISHWARI SINGH AND OTHERS (PETITIONERS) v NARAIN DAT AND OTHERS (OPPOSITE PARTIES) *

Act No I of 1877 (Specific Relief Act) section 42—Suit for declaration of title—Waste land—Plaintiff out of possession

Held that the fact that land was waste land and therefore of no immediate practical use was no bar to the application of section 42 of the Specific Relief Act where the plaintiff being admittedly out of possession claimed only a declaration of his title *Ramanuja* v *Devanayaka* (1) distinguished.

THE plaintiffs in this case sued for a declaration of their title in respect of certain land, of which they were admittedly not in possession and in fact it was admitted by them that they had not been in possession of the land in suit for at least seven years prior to the institution of the suit The claim for the declaration sought was based on Mr Beckett's settlement It was resisted on the ground, among others, that section 42 of the Specific Relief Act barred it The court of first instance dismissed the plaintiffs' claim both on the merits and on the ground that it was barred by section 42 of the Specific Relief Act On appeal by the plaintiffs the learned Deputy

* Civil Miscellaneous No 556 of 1913

(1) (1885) I. L. R., 8 Mad 361.

Commissioner accepted the appeal and decreed the claim on the ground of title, ignoring the plea taken under section 42 of the Specific Relief Act. The defendants preferred a second appeal to the court of the Commissioner of Kumaun, and the learned Commissioner upheld the judgement of the first appellate court without any reference to the objection taken by the defendants appellants under the Specific Relief Act On an application by the defendants appellants to the Local Government the present reference was made to the High Court for opinion on three questions, viz, (1) whether the plea of the defendants that the suit is barred by section 42 of the Specific Relief Act is a valid one, (2) whether the first and second appellate courts were justified in ignoring that plea, and (3) what order should be passed as to costs

Mr. *M. L. Agarwala*, for the applicants, submitted that the plaintiffs (opposite party) sued for a declaration that they were owners of certain plots of land that had been acquired by alluvial action of the river Kosi in Kumaun and over which the defendants had in recent settlement got their names entered wrongfully to the exclusion of the plaintiffs It was admitted by the plaintiffs that they were not in possession of the land and therefore a suit for mere declaration was barred by section 42 of the Specific Relief Act

Rai *Braj Narain Gurtu*, for the opposite party, submitted that in the previous settlement the land was recorded as *gaon sanjayat* and was entered in the names of both the parties In the last revision of settlement it was entered in the names of defendants only The defendants admitted in their written statement that at the time of the suit the land in dispute was merely waste land, it, therefore, was not in possession of either party. The plaintiffs had not been ousted by the defendants and need not have claimed for possession against them. The allegation of the plaintiffs was that an entry prejudicial to their interests had been made in the Revenue record and the only relief they need have asked for was a declaration of their rights He cited *Ramanuja* v *Devanayaka* (1) to show that the term 'further relief' in section 42, Specific Relief Act, pre supposed the actual withholding of the fruit of the right of which a declaration was sought and

(1) (1885) I. L. R., 8 Mad., 361

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not its mere denial and in the present case neither party being in possession there was no actual withholding of the fruits of the plaintiffs right by the defendants and no further relief need have been asked for He also cited Dr Banerji s Specific Relief Act p 664

MUHAMMAD RAFIQ and PIGGOTT JJ —This is a reference under Rule 17 of the Rules and Orders relating to the Kumaun Division 1894 asking us to give our opinion on two points mentioned in the letter of reference It appears that the plaintiffs in the case sued for a de laration of their title in respect of cer ain land of which they were admittedly not in possession and in fact it was admitted by them that they had not been in possession of the land in suit for at least seven years prior to the institution of the suit The claim for the declaration sought was based on Mr Beckett s settlement It was resisted on the ground among others that section 42 of the Specific Relief Act barred it The court of first instance dismissed the plaintiffs claim both on the merits and on the ground that it was barred by section 42 of the Specific Relief Act On appeal by the plaintiffs the learned Deputy Commissioner accepted the appeal and decreed the claim on the ground of title ignoring the plea taken under section 42 of the Specific Relief Act The defendants preferred a second appeal to the court of the Commissioner of Kumaun and the learned Commissioner upheld the judgement of the first appel late court without any reference to the obje tion taken by the defendants appellants under the Specific Relief Act On an application by the defendants to the Local Government the present reference has been made to us for opinion on three questions viz (1) whether the plea of the defendants that the suit is barred by section 42 of the Specific Relief Act is a valid one (2) whether the first and second appellate courts were justified in ignoring the plea and (3) what order should be passed as to costs

On reference to the pleadings in the case there is no doubt that the objection under section 42 was taken by the defendants respondents throughout There is an admission by the plaintiffs apart from any other evidence on the record that the plaintiffs were out of possession for more than seven years prior to the institution of the suit They, therefore, could claim a further

relief than that of a mere declaration It is contended on their behalf that the land in suit was at the time of the institution of the suit lying waste and neither party was in possession of it, and therefore the plaintiffs need not have asked for possession The only thing that stood in their way was an entry in the settlement of 1906, by which, owing to some mistake the names of the defendants respondents had been entered in respect of the land in suit The learned counsel in the course of his argument referred to the case of *Ramanuja* v *Devanayaka* (1) in support of his contention. We do not think that the Madras case helps the plaintiffs at all It is laid down there that under section 42 of the Specific Relief Act the Court should not make a declaration of title when the plaintiffs are able to seek further relief than a mere declaration and omit to do so But it is said that if the plaintiffs had been in possession of the entire property and the defendants denied their title and required the plaintiffs to deliver possession to them, then the plaintiffs may claim a declaration of right to hold the property In the present case the plaintiffs were admittedly out of possession and the defendants are obviously keeping them out of it The plaintiffs, therefore, could have sued and ought to have sued for recovery of possession of the land in suit

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Our answer to the first question, therefore, is in the affirmative and to the second in the negative As to costs we see no adequate reason why they should not follow the event.

REVISIONAL CRIMINAL.

Before Mr Justice Piggott

EMPEROR v NANHUA *

1914 *March* 11

Criminal Procedure Code sections 350 and 528—Transfer—Jurisdiction—Power of court to which a case is transferred to act on evidence taken by the court from which it came

Section 350 of the Code of Criminal Procedure is not limited to cases in which Magistrates succeed each other in office but applies also to all cases transferred from the file of one Magistrate to that of another under section 528, Criminal Procedure Code An order of commitment to the Court of Session passed by a Magistrate on evidence recorded by a bench of Magistrates from whose court it was transferred is not an illegal order

* Criminal Reference No 127 of 1914.

(1) (1885) I L R. 8 Mad 361

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v
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Queen Empress v *Bashir Khan* (1) distinguished *Emperor* v *Angni* (2) not followed. *Mohesh Chand a Saha* v *Emperor* (3) and *Paramasivy Goundan* v *Emperor* (4) followed.

THE facts of this case were as follows —

A case was started against the accused in the court of a bench of magistrates exercising second class powers under section 324 of the Indian Penal Code Evidence had been recorded by the bench, when the District Magistrate acting under section 528 of the Code of Criminal Procedure transferred the case to a magistrate having first class powers The latter acting on the evidence recorded by the bench passed an order committing the accused to the Court of Session The Sessions Judge however having doubts concerning the jurisdiction of the Magistrate who passed the order referred the case to the High Court, recommending that the order of commitment should be quashed.

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

The accused was not represented

PIGGOTT, J —This is a reference by the Sessions Judge of Budaun asking this Court to quash a commitment for trial to his court by a first class magistrate of that district The learned Sessions Judge is of opinion that the order of commitment was made without jurisdiction and is consequently bad in law It appears that the case was one in which action was first taken in respect of an alleged offence under section 324 of the Indian Penal Code It was before a bench of magistrates exercising second class powers and not empowered to commit an accused person for trial to the Sessions The District Magistrate acting under section 528 of the Code of Criminal Procedure transferred the case to a magistrate of the first class The latter acting on the evidence which had already been recorded by the bench of magistrates framed a charge under section 326 of the Indian Penal Code and passed an order committing the accused for trial to the Court of Session It does not appear that the accused demanded to have the witnesses or any of them resummoned and re heard, the presumption is that they did not. The order complained of is an order of commitment

(1) (1892) I L. R. 14 All. 34 (3) (1908) I. L R 35 Calc. 457
(2) Weekly Notes 1889 p 130 (4) (1908) I. L. R. 32 Mad., 218

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and it seems to me at least open to question whether the Sessions Judge had any concern with the nature of the evidence on the strength of which the committing magistrate had seen fit to pass the order It certainly could not be said that the order was without jurisdiction after the committing magistrate had become duly seised of the case in consequence of the order under section 528 of the Code of Criminal Procedure The Sessions Judge says that the provisions of section 350 would not override those of section 208 of the Criminal Procedure Code, but with this general proposition I am unable to agree In any case section 350 of the Criminal Procedure Code undoubtedly applies to a magistrate succeeding within the meaning of that section, who may act upon the evidence recorded by his predecessor, and his action may take the form of framing a charge and committing the accused for trial It has however, been doubted whether section 350 of the Code of Criminal Procedure applies at all to cases which have been transferred from one court to another under section 528 of the Code of Criminal Procedure In *Queen Empress* v *Bashir Khan* (1) a Judge of this Court seems to have assumed that for a magistrate to proceed after an order of transfer upon the evidence which he found already on the record was at least an irregularity In that case, however, it was distinctly held that the accused had been prejudiced by the course adopted by the magistrate to whom the case had been transferred In the present case, assuming that the evidence on the record, if true, does disclose the commission of an offence punishable under section 326 of the Indian Penal Code it does not seem to me that the accused can be said to have been in any way prejudiced The evidence will have to be taken before the Court of Session, and the accused will have every opportunity of cross examining the witnesses for the prosecution before that court pronounces upon his guilt or innocence There is one case of this Court which has been referred to by the learned Sessions Judge, namely, *Queen Empress* v *Angnu* (2) in which the view was taken that the provisions of section 350 of the Criminal Procedure Code would not apply at all to a case which came before another court under an order of transfer This case however, has recently been considered by a Bench of the Calcutta High Court in

(1) (1892) I L R 14 All 346 (2) Weekly Notes, 1889, p 130

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Mohesh Chandra Saha v *Emperor* (1), where the Allahabad ruling was dissented from and it was expressly laid down that section 350 of the Criminal Procedure Code is not limited to cases in which magistrates succeed each other in their offices but applies also to all cases transferred from the file of one magistrate to that of another under section 528 of the Criminal Procedure Code This case has been followed in *Palaniandy Goundan* v *Emperor* (2), where stress is laid upon the use of the word "*therein*" in section 350 aforesaid I am content to follow these rulings, more particularly in a case like the present where as I have already pointed out, no possible question of prejudice to the accused person can be said to arise I accordingly decline to accede to the reference of the learned Sessions Judge and order the record to be returned

Commitment upheld

APPELLATE CIVIL

1914
March 24

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

KANIZ FATIMA BEGAM (DECREE HOLDER) *v* SAKINA BIBI AND OTHERS (JUDGEMENT DEBTORS)*

Act No XXIII of 1871 (Pensions Act), section 11—Pension—Grant of land by Government—Sanad—Construction of document—Execution of decree—Civil Procedure Code (1908), section 60 (g)

The Government for political considerations granted certain property to the original grantee for life and to his descendants as an absolute estate *Held* that such grant did not constitute a political pension within the meaning of section 60 (*g*) of the Code of Civil Procedure, and that the land so granted was not exempt from attachment and sale in execution of a decree

Held also that the rights of the parties to whom the grant had been made by the Government must be determined by reference to the original *sanad* conferring title on the grantee and his descendants and the opinions expressed by certain Revenue Officers as to its meaning were irrelevant on a question of the construction of the document. *Lachmi Narain* v *Makund Singh* (3) and *Amna Bibi* v *Najm un nissa* (4) followed

THE facts of the case are as follows —

One Musammat Kaniz Fatima Begam obtained a decree against her husband Ghulam Mohiuddin Ashraf Khan in lieu of her dower

* First Appeal No 24 of 1913 from a decree of Hedayat Ali, Officiating Subordinate Judge of Gorakhpur dated the 12th of October 1912

(1) (1908) I. L. R., 35 Calc 457
(2) (1908) I. L. R., 32 Mad 218
(3) (1904) I. L. R., 26 All., 617.
(4) (1909) I. L. R., 31 All., 382.

In execution of that decree she applied for the sale of her deceased husband's property This application was opposed by the legal representatives of the deceased on the ground that this property was given by the British Government to their ancestor, Karim Khan, a Pindari Chief for political considerations and it constituted a political pension Therefore, according to the provisions of section 60 cl (g) of the Code of Civil Procedure and Act XXIII of 1871, this property was not attachable The lower court accepted this objection

The decree holder thereupon appealed to the High Court

The Hon'ble Dr *Sundar Lal* (with him The Hon'ble Mr *Abdul Raoof* and Munshi *Haribans Sahai*), for the appellant, submitted that the property in question was given to one Karim Khan on the 13th of August, 1819 Under the terms of the sanad Karim Khan held the property for life and after him it devolved on his heirs as an absolute estate with fixed Government revenue The grant to the heirs was a grant of land itself and was not a pension within the meaning of either the Pensions Act or the Code of Civil Procedure The word 'pension is not defined in the Code of Civil Procedure In Wharton's Law Lexicon it is defined as a periodical payment of money in consideration of past services, it is used in juxtaposition with the term stipends, gratuities &c, in section 60 (g) and obviously refers to payments of money *ejusdem generis* Therefore a grant of land is not a pension within the meaning of section 60 (g) of the Code of Civil Procedure, *Lachmi Narain* v *Makund Singh* (1), *Amna Bibi* v. *Najm un nissa* (2) and *Secretary of State for India in Council* v *Khemchand Jeychand* (3) The definition of the term given by the Full Bench of the Bombay High Court has been accepted by our Court in the cases referred to As to Act XXIII of 1871, the definition of that term in section 3 widens the scope of it by including other grants of money allowances and grants of Government revenue, but the term is still confined to payments of money by the Government and does not include grants of land, *see* ss 11 and 12 of Act XXIII of 1871 The unreported judgement of the High Court in F. A No 32 of 1878, decided on the 27th Novmber, 1878,

(1) (1904) I L R. 26 All 617 (2) 1909) I. L R 31 All., 382
(3) (1860) I. L. R. 4 Bom., 432

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was not *inter partes* It decided what the nature of the grant of land was upon the evidence given in that case

The sanad of 13th August, 1819, was obviously not before the Court and its judgement was solely based on certain correspondence between the Board of Revenue the Collector of Gorakhpur and the Commissioner of Benares between the years 1846 and 1853 These letters only express the opinions of the officers and they cannot be read as evidence, being inadmissible for the purpose of ascertaining the contents of the sanad of 1819 The question depends solely on the interpretation of the sanad, and the opinion of the Board of Revenue as to its true interpretation given 27 years after is irrelevant

Munshi *Gobind Prasad* (with him Maulvi *Muhammad Ishaq*) for the respondent submitted that he relied solely on the judgement of the High Court in F A No 32 of 1878 dated the 27th of November 1878, in which it was decided in respect of this very property that it was a political pension and was not liable to attachment and sale The correspondence between the Board of Revenue and the Commissioner of Benares and the Collector of Gorakhpur shows clearly that the heirs of the 'Jagirdar had a limited estate for the maintenance out of the profits of the property of which the Government was the proprietor

MUHAMMAD RAFIQ and PIGGOTT JJ —These two appeals, Execution First Appeal No 24 and No 25 of 1913 are connected The appellant in both the cases is Musammat Kaniz Fatima Begam the widow of one Ghulam Mohi ud-din Ashraf Khan She obtained a decree against the estate of her husband for her dower In execution of her decree she applied for the attachment of certain landed property, alleging it to have belonged to her deceased husband. She sought execution by two separate applications, one for costs and the other for the recovery of the dower debt, and in both the applications she sought to attach the landed property of her deceased husband The applications were opposed by some of the legal representatives of Ghulam Mohi ud-din who were in possession with others of his property The main objection was that the said property was granted to an ancestor of Ghulam Mohi ud-din, called Karim Khan, a Pindari Chief, for political considerations and, therefore

constituted a 'political pension' and hence was incapable of being attached and sold in execution of the decree of Musammat Kaniz Fatima Begam. The learned Subordinate Judge accepted the objection and rejected the two applications The widow of Ghulam Mohi ud-din that is, the decree-holder has come up in appeal to this Court She contends that the property which she is seeking to attach and sell in execution of her decree was not granted to Karim Khan as a political pension On the other hand the learned counsel for the respondents contends that the property in question does fall under the definition of 'political pension" He bases *his contention on three letters of Revenue officers dated 1846 1853* Those letters passed between the Board of Revenue, the Commissioner of the division and the Collector of Gorakhpur, and gave no doubt some support to the argument for respondents But we cannot treat them as anything more than a mere expression of opinion by the Board of Revenue as to the right of the *jagirdars* in the lands granted to them The rights of Karim Khan and his descendants must, however be determined by reference to the original sanad of the 13th of August 1819 The terms of that sanad distinctly show that whatever rights may have been given to Karim Khan himself for his life time an absolute estate in the property in suit was given to his descendants They have therefore, a heritable and transferable right in the estate in question The point under discussion is covered in our opinion, by two rulings of this Court viz *Lachmi Narain* v *Makund Singh* (1) and *Amna Bibi* v *Najm un nissa* (2). We therefore allow the two appeals set aside the orders of the court below and remand the cases to it for disposal according to law Costs are allowed to the appellants

Appeals allowed

(1) (1904) I L R 26 All 617 (2) (1909) I L R 31 All, 382

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KANIZ FATIMA BEGAM v SAKINA BIBI

1914
March, 27

Before Mr Justice Tudball

HAIDARI BEGAM (DEFENDANT) v GULZAR BANO (PLAINTIFF) *

Act No VII of 1870 (Court Fees Act) schedule I, article 1—Court fee—Subject-matter in dispute in appeal—Suit for possession—Defence of lien for dower—Appeal by defendant

In a suit for recovery of property in the possession of a Muhammadan lady the defendant pleaded, first, that the plaintiff had no title, and, secondly, that she was not entitled to a decree for possession without payment to the defendant of Rs 80 000, the amount of dower due to the defendant The court of first instance decreed the suit for possession, holding that payment of the defendant's dower whatever it might amount to, was not a condition precedent to the plaintiff s obtaining a decree The defendant appealed, paying court fees on the value of the property On a reference by the taxing officer, as to whether she was liable to pay court fees on Rs 80,000 as well, *held*, that the subject-matter in dispute in the appeal was the property of which possession was sought and that the court fee paid was sufficient

THIS was a reference made under section 5 of the Court Fees Act, 1870, by the Taxing Officer of the Court The following order sets forth the facts of the case:—

In this case the defendant appellant seeks that the decree of the court below be set aside and the suit be dismissed. The defendant appellant is the widow of one Saiyid Kurban Husain who is the own brother of the plaintiff. The plaintiff claims that her right in certain property may be established and a declaration made to the effect that the defendant appellant has no title there to and that she (the plaintiff) may be put in proprietary possession of certain property She also stated that if she was held liable to the payment of the dower debt due to the defendant she was ready to pay the same.

"In the lower court the defendant appellant denied the plaintiff s title to and possession over the property, and contended that her dower debt amounted to Rs 80 000 and that in lieu thereof she was entitled to remain in possession of the entire property She also alleged that as the plaintiff had not shown her readiness to pay the full amount of her dower debt the suit was liable to be dismissed

"The lower court decreed the suit in the plaintiff s favour, and did not record any finding on the 2nd issue viz, 'What is the amount of the defendant s dower debt?' It, however expressed an opinion in its judgement that the plaintiff was entitled to recover possession of the property in dispute even if the defendant's dower debt be unpaid.

"The defendant appellant has now preferred this appeal to this Court and has paid a court-fee of Rs 700, as was paid by the plaintiff respondent on the plaint She seeks that the decree of the court below be set aside and the plaintiff respondent's suit be dismissed.

* Stamp Reference in First Appeal No 343 of 1913, under section 5 of the Court Fees Act

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HAIDARI BEGAM v. GULZAR BANO

"Pleas Nos 1, 3 and 9 of the memorandum of appeal are important The first plea states that she is entitled to retain possession till her dower debt is paid in full and in plea No 9 she claims to hold the entire property against the plaintiff in lieu of dower It is, therefore, open to question whether she is not liable to pay court fee on the sum of Rs 80 000 which she claims as the amount of her dower debt If this view is correct a further court fee of Rs 615 is due from the defendant appellant

"The learned coun el for the defendant appellant maintains that the appellant is merely asking for the suit to be dismis ed and claims no set-off I have had an opportunity of hearing the learned couns l, and I asked him whether there was any bar to the Bench hearing the case passing a decree modifying the decree of the lower court to this extent that the plaintiff be given possession and her title be upheld on condition that she pays Rs 80 000 the amount of the dower debt as claimed by the defendant appellant, to the defendant appellant The learned counsel admitted that such a decree was possible, but he maintains that, even if such a decree be passed the defendant appellant cannot execute the same, but the defendant appellant is already in possession of the property and if she obtains such a decree she obtains the relief she desires as mentioned in the pleas raised in the memorandum of appeal

"Schedule I, Article 1 of the Court Fees Act gives the *ad valorem* fee to be paid on the subject matter in dispute in the case not only on claim but on counter-claim I consider therefore that the court fee should be paid on the value of this counter-claim and hold that the additional court fee of Rs 615 must be paid As, however the question is by no means free from difficulty and is of general importance I refer the same to the Honourable Taxing Judge"

On the matter coming up before the Taxing Judge

Dr *Satish Chandra Banerji*, for the defendant appellant —

The question is what is the value of the subject matter in dispute in the appeal In the recent case of *Raghubir Prasad* v. *Shankar Bakhsh* (1) it was said that the subject-matter in dispute would be the decree of the lower court If that test is applied then the proper court fee is that calculated on five times the revenue of the property over which the lower court has awarded possession, that fee has been paid on the appeal A defendant is entitled to raise all kinds of pleas The defendant resists the suit on the ground, *inter alia*, that she is entitled to retain possession in lieu of dower The dispute is really about the property, as to whether the plaintiff is or is not entitled to immediate possession The claim for the dower debt is merely incidental to the real claim namely, possession of the property The case is analogous to a case where the plaintiff sues to eject a

(1) (1913) I L R 36 All. 40

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tenant and the latter pleads *inter alia* that he should not be ejected until the plaintiff pays for improvements made by the tenant In such a case the question of improvements arises only incidentally, the subject matter of the appeal, as well as of the suit being the property of which possession is sought I rely on the cases of *Reference under Court Fees Act, section* 5 (1) *Shaikh Nawab Ali* v *Durga* (2) and *Abdur Rahman* v *Charag Din* (3) The real test to be applied is whether the appellate court can pass a substantive decree in favour of the appellant for the sum of money which is being said to be the subject matter in dispute in the appeal The utmost that the appellant can get in this case is to have the suit dismissed, nothing beyond that She can get no decree which she can execute for the Rs 80 000 or any portion thereof Should the court pass a decree for possession conditional on the plaintiff paying Rs 80 000 or some other sum it will be entirely at the plaintiff s option to pay it or not, the defendant appellant will not be able to recover it by execution of the decree The court fee paid is therefore sufficient

The following order was passed by TUDBALL J —

This is a reference by the Taxing Officer The defendant appellant is the widow of a deceased Muhammadan Syed Qurban Husain The plaintiff respondent is the own sister of the deceased She brought a suit to obtain possession of certain property and a declaration that the defendant had no title thereto She added that if she were held liable for payment of any dower debt due to the defendant she was ready to pay the same In the court below the defendant appellant denied the plaintiff s title to the property and further contended that her own dower debt amounted to Rs 80 000 and that she was entitled to remain in possession of the entire property at least until her dower debt had been satisfied. The court of first instance decreed the plaintiff s suit. It did not go into the question of the amount of the defendant s dower being of opinion that the plaintiff was entitled to recover possession even if the dower debt remained unpaid The defendant appellant has now preferred this appeal paying a court fee equal in amount to that paid by the plaintiff in the lower court.

(1) (1600) I L R 23 Mad 81. (2) (1897) 11 Oudh Cases 45

(3) (1907 1909) Punj Rec, C J., No. 10 p 124.

She raises the same pleas, and the question before me is whether she is liable to pay court fee on the sum of Rs 80,000, which she claims as the amount of her dower debt The question is what is the value or amount of the subject matter in dispute in this appeal It is suggested that it is not only the property in dispute but also the dower debt claimed by the appellant It is perfectly true that it is open to this Court to grant a decree to the plaintiff conditional on payment of whatever may be found due to the defendant as her dower debt But even in that case it will not be a decree which the defendant appellant would be able to put into execution, so as to enable her to recover her debt It would be merely an attachment of a condition to the decree for possession Of course it may also be that the Court might dismiss the claim of the plaintiff *in toto* or it might uphold the decree of the court below In any view it seems to me impossible to hold that the amount or value of the subject matter of this appeal is anything more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain The same considerations do not operate in this instance as would operate if the plaintiff had appealed against a decree for possession conditional on payment of a large sum I am, therefore, of opinion that the court fee already paid is sufficient

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HAIDARI BEGAM *v* GULZAR BANO

Before Sir Henry Richards Knight Chief Justice, and Justice Sir Pramada Charan Banerji

1914 *March* 27

MUHAMMAD ABDUL GHAFUR KHAN (PLAINTIFF) *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS) *

Civil Procedure Code (1908), *sections* 109 *and* 110 *order XLI rule* 10—*Dismissal of appeal for default in furnishing security for costs—Application for leave to appeal to His Majesty in Council—'Substantial question of law*

Held that an order dismissing an appeal for default in furnishing security for costs under order XLI, rule 10 of the Code of Civil Procedure 1908 is not a fit subject for the grant of a certificate under section 109 (*c*) of the Code

THE facts of this case were as follows —

The plaintiff instituted a suit in the Court of the Subordinate Judge of Cawnpore claiming a declaration of his title to certain property The suit was dismissed by the court of first instance upon various grounds The applicant presented an appeal to the High Court which was admitted Subsequently an application

* Privy Council Appeal No 2 of 1914

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MUHAMMAD ABDUL GHAFUR KHAN v THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

was made on behalf of one of the respondents that the appellant should be ordered to give security for the costs of the appeal and also of the court below By an order, dated the 28th of June 1913 the High Court ordered that the plaintiff should furnish security within one month Security not having been furnished the Court on the 30th of July 1913 dismissed the appeal on the ground that security had not been furnished in compliance with its order This order was passed under the provisions of order XLI rule 10 sub rule (2)

The appellant thereupon applied for leave to appeal to His Majesty in Council

The appellant appeared in person

Mr *A E Ryves* for the respondents

RICHARDS C J, and BANERJI J —This is an application for leave to appeal to His Majesty in Council The facts are these The plaintiff instituted a suit in the Court of the Subordinate Judge of Cawnpore claiming a declaration of his title to certain property The suit was dismissed by the court of first instance upon various grounds The applicant presented an appeal to this Court which was admitted Subsequently an application was made on behalf of one of the respondents that the appellant should be ordered to give security for the costs of the appeal and also of the court below By an order dated the 28th of June 1913 this Court was pleased to order that the plaintiff should furnish security within one month Security not having been furnished this Court on the 30th of July 1913 dismissed the the appeal on the ground that security had not been furnished in compliance with its order This order was passed under the provisions of order XLI rule 10, sub rule (2) The applicant now seeks to obtain leave to appeal from this order

We will assume for the purposes of our order that the order is a final order We will also assume (although it is not very clear from the plaint or memorandum of appeal) that the suit out of which the proposed appeal arises related to property of the value of Rs 10 000 or upwards As the order of this Court had the effect of affirming the decree of the court below we have to see whether or not the appeal involves a substantial question of law The only question involved in the appeal is whether or not this

Court was justified under the circumstances of the case in ordering the appellant to give security for costs If the Court was justified in ordering security for costs to be given, it had no option but to reject the appeal when the order for security was not complied with We find it quite impossible to certify that the proposed appeal involves a substantial question of law. We, therefore, dismiss the application but make no order as to costs.

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MUHAMMAD ABDUL GHAFUR KHAN v THE SECRETARY OF STATE FOR INDIA IN COUNCIL

Application dismissed

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1914 *April*, 6

MUNNA LAL AND OTHERS (DEFENDANTS) v MUNUN LAL AND OTHERS (PLAINTIFFS)*

Mortgage by conditional sale—Foreclosure—Sale by mortgagee after foreclosure—Rights of purchaser—Suit for sale by puisne mortgagees—Act No IX of 1908 (Indian Limitation Act), schedule article 134—Limitation

A mortgagee under a mortgage by conditional sale foreclosed, and after foreclosure sold the mortgaged property as unincumbered Subsequently to this, certain puisne mortgagees who had not been made parties to the foreclosure proceedings brought a suit for sale on their mortgage *Held* (1) that the purchasers could not hold up as a shield the mortgage by conditional sale of their vendor, for that had become extinct on foreclosure and (2) that article 134 of the first schedule to the Indian Limitation Act 1908, had no application to the suit

THIS was a suit for sale on a second mortgage The first mortgage had been a mortgage by conditional sale, but the mortgagee had foreclosed and had thereafter sold the mortgaged property to the answering defendants The court of first instance decreed the plaintiffs' claim and the lower appellate court dismissed the defendants' appeal The defendants thereupon appealed to the High Court urging two main contentions, first, that they were entitled to set up as a shield against the suit the mortgage by conditional sale held by their vendor, and, secondly, that article 134 of the first schedule to the Indian Limitation Act, 1908, applied and the suit was barred by limitation

Dr *Satish Chandra Banerji*, for the appellant.

The respondents were not represented

MUHAMMAD RAFIQ and PIGGOTT, JJ —This was a suit for sale upon a mortgage It is now being contested by three

* Second Appeal No 225 of 1913 from a decree of Austin Kendall, District of Judge of Cawnpore, dated the 18th of November 1912 confirming a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 18th of December, 1911.

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MUNNA LAL v. MOHUN LAL.

persons, who were defendants Nos. 9, 10 and 11 in the original array of parties. In order to make clear the single point raised by this appeal it is sufficient to state the following facts. There was upon a part of the property now in suit a mortgage by conditional sale anterior in date to that of the plaintiffs. The prior mortgagee under this mortgage brought a suit for foreclosure, without impleading the plaintiffs, the puisne mortgagees. He obtained a decree for foreclosure and thus acquired the right, title and interest of the original mortgagor in the property covered by the mortgage by conditional sale. He then transferred the property by an out and out sale to these defendants Nos. 9, 10 and 11, who are now the appellants before us. The mortgage deed on which the present suit is brought is one of the 19th of July, 1890, and the plaintiffs in order to maintain the suit are compelled to avail themselves of the special period of limitation allowed by section 31 of the Indian Limitation Act, No. IX of 1908. The case for the appellants now before us is that they are entitled to hold up the original prior mortgage by conditional sale as a shield against the plaintiffs' claim, so that the plaintiffs cannot bring the property to sale without first redeeming this prior mortgage. They further contend that, as transferees from the original prior mortgagee, they are entitled to plead limitation under article 134 of schedule I to the Limitation Act, and that consequently the present suit should be dismissed as time-barred in so far as it affects that portion of the property in suit which was covered by the prior mortgage. In our opinion article 134 of schedule I to the Indian Limitation Act has no application to the present suit. In the first place, the suit is one for sale and is brought under the special provisions of section 31 of Act IX of 1908. In the second place, the position of these defendants appellants is not that of transferees from a mortgagee in the sense of article 134 aforesaid. At the time of the transfer in their favour the property mortgaged had been foreclosed and their transferor had acquired all the rights of the original mortgagor in the property which he purported to transfer. He was, therefore, what he represented himself as being, the owner of the property. We fail to see that the case of these defendants differs in any essential respect from that of transferees of property which has been sold as free of

incumbrances when as a matter of fact it is subject to a mortgage charge For these reasons we hold that this appeal fails and it is hereby dismssed It has been heard *ex parte*, so we make no order as to costs

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Appeal dismissed.

1914 April, 7

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

ABDUS SAMAD (PLAINTIFF) v THE CHAIRMAN MUNICIPAL BOARD MEERUT (DEFENDANT) *

Act (Loca) No I of 1900 *(United Provinces Municipalities Act), sections* 87 *and* 152—*Municipal board—Refusal of permission to re erect a building—Remedy open to applicant special appeal not suit*

When a Municipalboard refuses perm ss on to erect or re-erect a building the prop r way to contest such refusal is to appeal in the manner provided for by section 152 of the Un ted Provinces Municipalities Act 1900 The applicant for permission cannot mainta n a civil su t for an injunction to restrain the board from interfering w th the plaint ff s bu lding

THE facts of this case were as follows —

One Abdul Samad was the owner of certain shops situated on either side of a public road in Meerut These shops had at one time been connected with each other by means of a sort of gallery resting on arches The gallery having fallen into disrepair Abdus Samad applied to the municipal board for permission to re build it and also to build some further structure on the top The board refused permission Thereupon Abdus Samad instituted the present suit against the board claiming an injunction restraining it from interfering with his proposed building and for damages The court of first instance decreed the claim in part On appeal however that decree was set aside and the suit dismissed Abdus Samad accordingly appealed to the High Court

Mr *B E O Conor* and Maulvi *Muhammad Ishaq* for the appellant.

Mr *A E Ryves* and Mr *W Wallach* for the respondent

RICHARDS C J and BANERJI J —This appeal arises out of a suit brought by the plaintiff against the municipal board of Meerut The circumstances are as follows The plaintiff has

* Second Appeal No 1555 of 1912 from a decree of L Johnston D str ct Judge of Meerut dated the 2nd o October 1912, reversing a decree of Muhammad Husain first Additional Subordinate Judge of Meerut dated the 13th of July 1912.

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Ahmad [illegible]
v.
The Chairman Municipal Board Meerut.

been found to be the owner of certain shops on both sides of a public road in the city of Meerut. In the past there was some sort of gallery resting on arches which connected the shops on both sides of the road. The gallery had gone out of repair and the plaintiff applied to the municipal board for leave to repair the arches and gallery and also to build on the top of the gallery. The municipal board refused permission. Thereupon the suit out of which this appeal has arisen was instituted, the plaintiff claiming a perpetual injunction restraining the municipal board from interfering with what he wanted to do and damages. On the facts as found so far as the plaintiff sought to repair an existing structure the case came within the provisions of section [illegible] of the Municipalities Act. So far as he sought to make a new structure the case came within the provision of section 88. We need not consider now the provisions of the last mentioned section. So far as the case came within that section it was admittedly within the right of the board to refuse permission to allow the structure to be made. Section 87 provides that a person who intends to erect a building of this kind must give notice in writing of his intention. The board may refuse to grant permission upon some one or more of the grounds mentioned in the section. If the board fail to answer the application there is further provision made showing the course the applicant is entitled to take. If the order of refusal is made and the applicant feels himself aggrieved at what the municipal board has done an appeal is provided by section 152 which further provides that save by such appeal the order of the municipal board shall not be liable to be called in question. It is quite clear therefore that if the plaintiff in the present case felt himself aggrieved by the order of the municipal board refusing to give him leave to repair and re-erect the gallery and arch his remedy was by way of an appeal. But it is quite clear that he is not entitled to maintain a suit like the present one. This being so the decision of the lower appellate court was correct and the appeal fails. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramda Charan Banerji

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April, 8

LAL SINGH AND OTHERS (PLAINTIFFS) v THE COLLECTOR OF ETAH (DEFENDANT) *

Act (Local) No III of 1899 (United Provinces Court of Wards Act), section 48—Notice of suit—"Property of any ward"—Property attached in execution of a decree held by a ward

Held that the term 'property of any ward' as used in section 48 of the United Provinces Court of Wards Act, 1899, does not include property attached in execution of a decree held by a ward No notice is, therefore required of a suit brought by a person claiming title to such property for a declaration of his title

THE facts of this case were as follows —

The property of Raja Surajpal Singh was placed under the superintendence of the Court of Wards This property included a simple money decree obtained by the ancestor of the ward against the father of the plaintiffs The Court of Wards put the decree in execution and attached certain property which the appellants claimed to be their separate property, with which the judgement debtor had nothing to do Their objection having been over ruled by the executing court, they brought this suit for a declaration that the property in question belonged to them and was not liable to attachment and sale The Court of Wards, among other pleas defended the suit on the ground that notice under section 48 of the United Provinces Court of Wards Act (III of 1899 U P) had not been given The courts below dismissed the suit upon that ground alone

The plaintiffs appealed

Dr *Satish Chandra Banerji*, for the appellants —

Section 48 of the Court of Wards Act does not apply inasmuch as the property to which the suit relates is the village attached, and that confessedly is not the property of the ward That section bars only those suits which relate to the person or the property of the ward The decree no doubt is the property of the ward, but the plaintiff does not impeach that decree The decree is a perfectly good decree against the judgement-debtor and may be executed against his property The present

*Second Appeal No 293 of 1913 from a decree of A Sabonadiere, District Judge of Aligarh, dated the 13th of November, 1912, confirming a decree of Kunwar Sen Assistant District Judge of Aligarh, dated the 20th of June, 1912.

suit is one merely for a declaration of the plaintiff's right to certain property, which the decree holder ward does not claim to be his but alleges to be that of his judgement debtor, who, however, is not protected by the Court of Wards Act

Mr *A E Ryves* for the respondents —

The suit indirectly relates to the property of the ward The whole property of the ward, whether movable or immovable is under the superintendence of the Court of Wards Referred to section 15 of the Court of Wards Act The suit is, therefore, barred by the provisions of section 48 inasmuch as the execution of the decree will be affected by its result

Dr *Satish Chandra Banerji* was not heard in reply

RICHARDS, C J and BANERJI J —This appeal arises out of the following circumstances The Court of Wards as representing the estate of the minor Raja Surajpal Singh were putting into execution a decree which admittedly is the property of the ward In execution certain property was attached The appellants objected to the attachment but their objection was over ruled Whereupon the present suit was brought for a declaration that the property was not liable to attachment in execution of the decree The court of first instance dismissed the claim on the ground that no notice was given as provided by section 48 of the Court of Wards Act (No III of 1899) which was then in force The lower appellate court confirmed the decree of the court of first instance Section 48 is as follows —' No suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered to or left at the office of the Collector in charge of the estate stating the name and place of abode of the intending plaintiff the cause of action, and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left ' It is admitted that no such notice was served in this case It is contended on behalf of the appellants that inasmuch as the suit did not relate to the person or property of the ward notice was unnecessary It seems to us that this contention is sound. In the present suit the validity of the decree which belongs to the ward is not challenged. The property which is sought to be sold in execution of the decree

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admittedly does not belong to the ward Under these circumstances in our opinion the present suit does not relate either to the person or the property of the ward, and we think that a notice was therefore unnecessary We allow the appeal, set aside the decree of both the courts below, and remand the case to the court of first instance through the lower appellate court with directions to re-admit it under its original number on the file and proceed to determine the same according to law Costs here and hitherto will be costs in the cause

Appeal decreed and cause remanded

1914
April 8

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji

MAQBUL HUSAIN (DEFENDANT) v GHAFUR UN NISSA (PLAINTIFF) *

Muhammadan law—Gift—Revocation—Substantial alteration of subject matter—Partition

Held that a Revenue Court partition of villages the subject of a deed of gift, does not amount to such a substantial alteration of the subject matter in the hands of the donee as would under the Muhammadan law render the gift irrevocable by the donor

THE facts of this case were as follows —

The plaintiff executed a deed of gift in favour of the defendant, who was her husband's nephew, of the whole of her property on the 15th of September, 1908 She sued for revocation of this deed of gift on the ground that she was induced to execute it by the defendant, who was her mukhtar a'am, and that he had not paid her any maintenance allowance as provided for by the deed In her deposition she denied execution of the deed The defendant pleaded that the suit was not maintainable at all, and even if it was, the plaintiff was not entitled to revocation of so much of the gift as related to property on which he had spent his own money by getting it partitioned and so improving it He further alleged that the gift being a pious act of the donor was irrevocable under the Muhammadan law by which the parties were governed

The court of first instance dismissed the suit, but the lower appellate court finding all the issues against the defendant reversed the decree The defendant appealed

* Second Appeal No 653 of 1913 from a decree of C E Guiterman Second Additional Judge of Aligarh dated the 25th of March 1913, reversing a decree of Banke Behari Lal Subordinate Judge of Aligarh dated the 15th of March, 1912

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MAQBUL HUSAIN v. GHAFUR-UN-NISSA.

Munshi *Gobind Prasad* for the appellant:—

The property was partitioned after the gift and there was an alteration of the subject. The donor therefore cannot revoke the gift. The defendant has spent money over the property. He cited Ameer Ali's Muhammadan Law, 4th Edn. 152.

Mr. *Agha Haidar*, for the respondent:—

Under the Muhammadan law the donor's right to sue for revocation of a gift is barred only when the subject matter of the gift has altered in substance in the possession of the donee. A partition only affects the fiscal position of the various co-sharers; it does not alter the nature or substance of the property. The property is subject to the free exercise of the right of ownership.

Munshi *Gobind Prasad*, was heard in reply.

RICHARDS, C.J., and BANERJI, J.:—This appeal arises in a suit brought by the plaintiff for possession of certain property and revocation of a deed of gift in respect of it executed by her in favour of the defendant appellant. Her case as set forth in the plaint was that she had no counsellor or adviser except the defendant and that the defendant had induced her to make the deed of gift in his favour having led her to believe that he would always remain obedient and faithful to her and would defray all her expenses. It has been found by both the courts below that the plaintiff was aware of the terms of the deed of gift and that no fraud has been proved. We cannot, however, overlook the fact that by the gift she divested herself of everything she had and left herself completely at the mercy of the defendant. Under such circumstances very clear and cogent evidence should have been given to show that she understood the nature of the transaction and its effect upon her interests. Under the Muhammadan Law by which the parties are governed, a donor has a right to revoke a gift except in the cases specified at page 152 of Volume I of Ameer Ali's Muhammadan Law. The defendant appellant contends that this case falls within the purview of clause (*f*) viz. that the subject matter of the gift has altered in substance in the possession of the donee. What happened was this. According to the court of first instance two villages comprised in the gift had been partitioned at the instance of the defendant, he owing the [illegible] of the [illegible] and for this reason that [illegible] extended these villages

from the operation of its decree The lower appellate court held that only one village had been partitioned before the suit was filed and excluded that village only from the decree We are unable to agree with the view of the court below in this respect There has in our opinion been no substantial alteration of the subject matter of the gift in the possession of the donee The property at one time formed part of a bigger mahal, by a partition smaller mahals have been formed and the property in dispute is now part of one of the smaller mahals The only difference is that the plaintiff has become a co sharer of a smaller mahal instead of the bigger mahal There has been no alteration in the nature of the property The property exists where it was We think that the courts below have erred in holding that the gift could not be revoked by the plaintiff

One other point was raised on behalf of the appellant viz that house No 1320 had not been claimed in the plaint This is true but this house is included in the deed of gift and the plaintiff sought to set aside the whole gift In the lower appellate court the point does not seem to have been pressed and in our opinion there is nothing in it

The result is that we dismiss the appeal and allowing the objection filed on behalf of the respondent decree the plaintiff's claim in full Having regard to the fact that the plaintiff gave false evidence in the court of first instance and tried to support her claim by untrue evidence we direct the parties to bear their own costs in all courts

Appeal dismissed

PRIVY COUNCIL.

*P C
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March 5, 6, 9, 27.

AMIR BEGAM (DEFENDANT) *v* BADR UD DIN HUSAIN (PLAINTIFF) AND OTHERS (DEFENDANTS)

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow]

Arbitration—Award—Misconduct of arbitrator—Private arbitration—Application to file award and for a decree in accordance with it—Civil Procedure Code, 1908, schedule II paragraphs 14, 15, 20—Arbitrator as witness—Evidence of arbitrator where charges of dishonesty and partiality are made—Portion of award invalid, but separable—Arbitrator's notes

Held in this case that an award which had been made in arbitration proceedings without the intervention of the Court, and in respect of which an application was made under paragraph 20 of the Civil Procedure Code 1908, that the award should be filed in Court and a decree passed in accordance therewith, was not invalidated by anything done by the arbitrator in the arbitration proceedings his acts not amounting to corruption or misconduct within the meaning of paragraph 15 of schedule II of the Code

If irregularities can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator, but no such irregularities were established by the appellant, on whom the onus of proving them lay

An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence he can give is without doubt properly admissible It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleugh* v *Metropolitan Board of Works* (1), but where charges of dishonesty are made the court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established In this case the charges of dishonesty and partiality were held to have entirely failed

Where part of an award was found to be invalid as being in excess of the arbitrator's powers and it was separable from the rest, the remainder of the award being good was maintained.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him, but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied

Present:—Lord SUMNER Lord PARMOOR, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1871) L. R., 5 H. L., 418.

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AMIR BEGAM v BADR UD DIN HUSAIN

APPEAL No 50 of 1913 from an order and decree (15th August, 1911) of the Court of the Judicial Commissioner of Oudh, which reversed an order and decree (5th May, 1911) of the Court of the Subordinate Judge of Lucknow

The main question for determination on this appeal related to the validity of an award made on the 15th of March, 1910

The facts are sufficiently stated in their Lordships' judgement

The appeal arose out of an application by the first respondent to the Subordinate Judge under the provisions of schedule II, paragraph 20, of the Code of Civil Procedure, 1908, praying that the award (which was made without the intervention of the court) might be filed and a decree passed in accordance therewith, the application being treated as a suit in which the applicant was plaintiff, and the appellant and the other respondents were defendants

The defendants opposed the application on various grounds, of which the only one now material is the misconduct of the arbitrator, and it was on this ground that the Subordinate Judge dismissed the suit The details of the misconduct alleged are referred to in their Lordships judgement

The plaintiff appealed to the court of the Judicial Commissioner and that Court (Mr B LINDSAY and Mr MUHAMMAD RAFIQ, Additional Judicial Commissioners) was of opinion that nothing amounting to misconduct on the part of the arbitrator had been established, that his explanations with regard to the principal charges made against him were reasonable and satisfactory, and that it was not competent to the court below to review his discretion, that the arbitrator had, however exceeded his powers under the reference in allotting specific portions of a property called Rasulabad (which was joint and undivided) to the respondents 2 to 5, and this part of the award being separable from the rest they considered it should be set aside, and reversing the decision of the Subordinate Judge they accordingly granted the application of the plaintiff with that exception

With reference to the powers of arbitrators they said —

As regards the powers and duties of an arbitrator no fixed rules can be laid down The extent of the powers and the nature of the duties are to be ascertained from the terms of the agreement to refer by which he is appointed In the present case the language of the agreement is of the widest possible description The parties after declaring the existence between them of

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disputes regarding the estate of the deceased Farid ud-din and the will l ft by him agree to appoint Sakhawat Ali as their arbitrator to settle these d sputes They empower him to decide their differences 'in any way he m ght deem proper' *(jis tariqa se munasib samjhenge)* and they undertook to be bound by his decision Clearly therefore it was the intention of the parties to arm the arbitrator with most extensive powers in fact they gave him authority to act in any manner he pleased provided of cour e that he dealt fairly with all parties concerned As for his duties they were well understood He was to decide whether the deceased had executed the w ll and he was to determine how the estate was to be distributed b tween the persons who had any claims as heirs of Farid ud-din

' Subject to any limitations contained in the instrument of his appoint ment and to any statutory direct ons as to the manner in which he is to dis charge his duties an arbitrator may conduct his proceedings in any manner he thinks fit so long as he acts in accordance with the principles of justice equity and good conscience He is not fettered by rules of practice which Courts of law adopt for general convenience He is not bound for example (as the lower Court appears to think he was) to record statements or admissions of the parties to take the depositions of witnesses to mark and file documents and to behave in other respects as if he were the Judge of a Civil Court bound by the adjective law laid down in the Code of Civil Procedure and the rules made under it He is not under any obligation to make notes of his pro eedings though it may be advisable for him to do so and if he does elect to keep such notes they are his own property and he cannot be compelled to produce them in Court He is not bound to observe the rules relating to evidence to be found in the Indian Evidence Act (see section 3 of the Act) In short he has greater latitude than the Courts of law in order to do complete just ce between the part es and may in forming his judgement act upon merely moral considerations of which a Court of law could not take cognizance (see Russell on Arbitration 9th edition 98)'

On this appeal—

De Gruyther, K C, and *B Dube* for the appellant conten ded that the award was bad on account of the misconduct of the arbitrator The award was not based on inquiry made or evidence given in the presence of the parties, but rested on the arbitrary assumptions of the arbitrator, or on assumed personal knowledge The arbitration proceedings should have been of the nature of arbitration under the common law in England, and assimilated to something like a judicial proceeding Here the arbitrator did not record the statements of claim made by the parties, he took no notes of any proceeding, nor of any admissions by the parties, nor of the evidence of any witness he examined He committed errors in the valuation of the property, and in its allotment and distribution to the various claimants, acting with

undue preference and partiality to some of them to the detriment of the others He was bound to observe the rules of evidence in the arbitration proceedings and could not it was submitted examine witnesses except with the consent and in the presence of the parties Reference was made to *In re Enoch Boel and Zaretsky and Co s Arbitration* (1) The arbitrator had no power to act contrary to the wishes of the parties if they desired inquiry on any point Wilson s Muhammadan law (4th edition) 256 He had made private inquiries without giving the appellant an opportunity of putting her view before him *Daya Kishen* v *Dharam Das* (2) per Edge C J was referred to An award may be set aside for the legal misconduct of the arbitrator though there may be no moral misconduct see *Kali Prosanno Ghose* v *Rajani Kant Chatterjee* (3) A portion of the award was admittedly in excess of the powers of the arbitrator and if so no decree it was submitted, could be made on the award Under the Civil Procedure Code on an application like the present one, either a decree must be made on it or the award must be rejected It cannot be decreed in part see *Mustafa Khan* v *Phulja Bibi* (4) The Subordinate Judge who saw the parties and witnesses came to a right conclusion and his decree should be restored

Upjohn K C and *G R Lowndes* for the first respondent contended that the arbitrator had not been guilty of any misconduct for which the award could be declared invalid Corruption on the part of the arbitrator was the only ground which could be taken under schedule II of the Code of Civil Procedure 1908 of which paragraphs 14 15 and 20 were referred to It was not enough to show any technical misconduct the arbitrator must be shown to have acted dishonestly Reference was made to the Civil Procedure Code 1908 section 47 The arbitrator had extensive powers under the reference and if in respect of his making a partition of part of the property he had acted in excess of his powers, that portion of the award it was submitted was separable from the rest and its being invalid did not necessitate the setting aside of the whole of the award The facts were gone into to show that

(1) (1910) 1 K B 327
(2) (1890) 4 All L J 109
(3) (1897) I L R 25 Calc 141
(4) (1905) I L R 27 All, 526.

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the conclusions come to by the Subordinate Judge were incorrect, and it was contended that the award was good and binding on the parties, and the decision of the appellate court was right

De Gruyther, K C, in reply contended that though each of the instances of partiality by the arbitrator might be insufficient by itself to prove the charge of dishonesty made against him, yet all of them together, where all favoured the first respondent at the expense of the appellant, would be sufficient proof

1914, March 27th —The judgement of their Lordships was delivered by Lord PARMOOR —

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 15th of August, 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by respondent 1 for the filing of an award

On the 6th of May, 1909, one Khwaja Farid ud din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property and had as heirs, according to Muhammadan law, a full sister (the appellant herein), two step brothers respondents 2 and 3, two step sisters respondents 4 and 5, and a widow respondent 6 Shortly before his death, the testator made a will by which he appointed respondent 1 his executor, and, as he was entitled to do by Muhammadan law, bequeathed him one third of his property After the death of the testator disputes arose between the parties interested, and litigation was commenced On the 6th of August, 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following form —

"Whereas there exists a dispute amongst us, the executants regarding the estate of Khwaja Farid ud-din, deceased, and the deed of will dated the 30th of April 1909, we, the executants have, of our own accord, appointed Munshi Sakhawat Ali, as a referee for the purpose of settling the matters in dispute We agree and record that the said referee may decide it in whatever way he may deem proper, we, the executants, shall remain bound by the award. Therefore we have executed these few presents by way of a deed of agreement so that they may serve as an authority"

The arbitrator entered upon the reference and published his award on the 16th of July, 1910 He confirmed the appointment of respondent 1 as executor, and gave him one third of the property The remaining property fell to be divided according

to Muhammadan law The parties were entitled in the following shares —The appellant to a third share the respondents 1 and 6 jointly to a moiety the respondents 2 and 5 to a sixth share The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation The property so valued amounted in the aggregate to 91 042 rupees There was a further item of 4 000 rupees, which was in no sense an ascertained or settled amount but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item for what it was worth, was allotted to the appellant The respondents 1 and 6 in respect of their joint half share were allotted property valued at 45 010 rupees The appellant in addition to the above item of 4 000 rupees was allotted property valued at 30 879 rupees and respondents 2 and 5 were allotted property valued at 15 153 rupees On the face of the award the distribution appears to be fairly made So far as there is any advantage it is in favour of the appellant This apparent advantage is referred to and explained by the arbitrator in his award

At the time of the tesator s death there was a considerable mortgage (20 000 rupees) affecting certain portions of his property The arbitrator recognized that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss He therefore decided that the debt of 20 000 rupees and its interest should as among the parties entitled under the will be a charge on the entire property of the testator and proportionately on all the co sharers and that each co sharer should be liable to pay in proportion to his share and that each co-sharer should as soon as possible pay his proportionate share, both capital and interest to the creditor Whether this provision in the award did give full protection to the allottees of the mortgaged prop rty it is not within the province of their Lordships to decide It is sufficient that the matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established The award further purported to assign specific lands in the zamindari of Rasulabad by way of partition a matter clearly outside the power

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of the arbitrator and which would render his award invalid unless this portion of his award is separable from the rest In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest It is well recognized law that when a separable portion of an award is bad the remainder of the award if good can be maintained In this respect their Lordships agree with the judgement of the Court of the Judicial Commissioner of Oudh and it becomes necessary to consider the grounds on which the remainder of the award has been attacked

On the 10th of June 1910 respondent 1 made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court under paragraph 20 of the second schedule of the Code of Civil Procedure (Act V of 1908) On such an application the Court if satisfied that the matter has been referred to arbitration and that an award has been made thereon and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved shall order the award to be filed and shall proceed to pronounce judgement according to the award Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire Paragraph 15 states the grounds on which alone an award shall be set aside The first of these grounds is corruption or misconduct of the arbitrator or umpire It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the respondent 1 who had been treated as plaintiff in the proceedings

On the 7th of September 1910 issues were framed by the Subordinate Judge The only material one is is the award vitiated by the misconduct of the referee as alleged under the paragraphs 9 to 20 of the first defendant s (the appellant s) written statement?

The misconduct alleged against the referee was twofold —

(1st) That the referee had acted corruptly and dishonestly in his capacity of judge

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was alleged on behalf of the appellant that there had been no proper inquiry since the parties had not been properly summoned to appear before the arbitrator and the appellant had not had an opportunity of meeting the case set up by the respondent 1. The burden of proving this allegation was upon the appellant and other defendants at the trial before the Subordinate Judge. The only relevant witness called on behalf of the appellant was Shaban Ali who admitted in cross-examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immovable property. As against this evidence which in itself is quite insufficient to prove the alleged irregularities the arbitrator stated on oath that he invited all parties to put in written statements before him but that they declined to do so, that he was never asked by any of the parties to hear oral evidence and that no oral evidence was tendered at any time and that he got little or no assistance from any of the parties in making his inquiries. It is however unnecessary in their Lordships opinion to further analyse this evidence since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use if necessary notes of the proceedings before him, but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

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The last point and the most important is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award This charge was found to be established by the Subordinate Judge The main evidence relied upon to support this conclusion was that given by the arbitrator himself in cross examination An arbitrator, selected by the parties comes within the general obligation of being bound to give evidence and where a charge of dishonesty or partiality is made any relevant evidence which he can give is without doubt properly admissible It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different propose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and on which his decision is final The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case *Buccleuch v Metropolitan Board of Works* (1) but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established

In the opinion of their Lordships the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible and utilized evidence relevant on the charge of corruption to criticize methods adopted by the arbitrator in determining the quantum of his valuations The course adopted in the cross examination of the arbitrator was not satisfactory There was a prolonged and critical examination into the details of figures used by the arbitrator in making his award but the charge of corruption was not put fairly and squarely to him so as to enable him to give a direct answer or explanation It is not surprising that cross examination so conducted should lead to a certain amount of confusion and contradiction but their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award In the first place the arbitrator sets out the

(1) (1871) L. R. 5 H. L. 418

details of the property allotted to respondent 1 and in each instance his estimation of value. The first property allotted is the entire village of Mohi-ud-dinpur alias Hajiganj and the estimated value is 28,785 rupees. In respect of this allotment and valuation three charges are made against the arbitrator. It is said, first, that Hajiganj was a choice portion of the property of the testator and that its allotment to respondent 1 showed partiality in his favour to the detriment of the appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to respondent 1. This explanation is in itself reasonable and effectively answers the charge.

The second allegation is of undervaluation. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to respondent 1. The evidence adduced in support of this charge is that the valuation was made on the patwari's figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalized value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross-examination. He considered the patwari's figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinize the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation, no account was taken of the zamindar's office said to be worth 500 rupees. The arbitrator's answer is that it was included as part of the village property, and that in any case it

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was covered by the addition of 2,000 rupees which he had made to the value of the village as a whole.

The second property allotted to respondent 1 consists of houses at Lucknow. It was said that the arbitrator had unfairly under valued this property to the detriment of the appellant and that he had included in his valuation a house which belonged to the appellant and not to the testator. There is no weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator having a difficulty in obtaining any satisfactory basis for fixing a valuation invited the parties to send in tenders stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was respondent 1, whose tender in the aggregate amounted to a price of 11,900 rupees. The appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligeable. The arbitrator fixed the value at 11,800 rupees, reducing the tender price in the case of two houses by the comparatively insignificant sum of 50 rupees. The method of valuation adopted by the arbitrator was within his discretion and it is impossible to find that the small alteration in the case of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and mentioning it in his will as a portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award

might be detrimental to respondent 1, but could have no effect whatever in defeating the title of the true owner In addition to Hajiganj and the house property the arbitrator allotted to respondent 1 certain properties of comparatively small importance Having regard to the decision at which their Lordships have arrived on the more important portions of the property allotted to respondent 1, it is unnecessary to follow under these heads the criticisms of the Subordinate Judge which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine No attack was made on the allocation of household furniture, cash and ornaments in Lucknow, or on their estimated value of 4,200 rupees

Having allotted his share to respondent 1, the arbitrator next proceeds in his award to allot her share to the appellant, and to estimate the value of such share There are three heads The entire village of Kundri, a share in the village of Rasulabad, and a sum of 4 000 rupees The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of 20 000 rupees, and it is alleged on behalf of the appellant that the arbitrator acted dishonestly in allotting to the appellant property subject to the disability of the mortgage, that he unfairly overvalued the testator's property in Rasulabad, and that he must have known that the allocation of the sum of 4 000 rupees was practically illusory In the allotment of the testator s share in the village of Rasulabad, the arbitrator was asked by respondents 2 to 5 to give them a share in Rasulabad adjoined to their share Mahal Pachhim which they already possessed The award shows that he complied with this request The question therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the appellant The appellant was already a co-sharer mauza in Rasulabad and holding a share in co tenancy with the testator It was therefore quite reasonable that the arbitrator should assign a share to the appellant of the testator s property in that village If the allocation under the above circumstances was properly made, the disability attached to the mortgage could not be avoided It was necessary that

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some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co sharers, each co sharer being liable to pay in proportion to his share and that each co sharer should so soon as possible pay his capital and intere t to the mortgagee Their Lordships have already referred to this portion of the award, indicating their opinion that the arbitrator had dealt with the liability of the mortgaged property providing what in his opinion appeared to be the best remedy Under these circumstances their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the appellant and agree in the decision of the Court of the Judicial Commissioner

Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly overvalued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at 95 042 rupees but this in itself is an error since it is clear on the face of the award that the estate was valued for distribution at 91 042 rupees, and that the additional sum of 4 000 rupees was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan This initial mistake affects the subsequent inference and their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator s figures The Subordinate Judge places considerable weight on the allotment of 4 000 rupees to the appellant as an element of misconduct in the arbitrator It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the appellant s share The answer to this objection appears on the face of the award. In calculating the value of the appellant s share of the testator s property this sum was not taken into account but thrown in as an additional item after the appellant had been allotted property estimated at 30 879 rupees in itself rather more than her third share of the valued property

Ahmad Khan was a karinda in the employ of the testator, and had been collecting his rents It was alleged before the arbitrator that this man had money in his possession which was owing to the estate and for which he had not accounted Some figures were placed before the arbitrator but there was no reliable evidence either of liability or of amount Ahmad Khan refused to appear before the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge The respondent 1 had given Ahmad Khan acquittance for any sums that might be due to him and the arbitrator was informed by Mr Muhammad Fasih, a pleader, and the son in law of the appellant, that he, too, had given Ahmad Khan discharges as he desired to get Ahmad Khan in his power to support the appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award no question would have arisen and, on the face of the award, the appellant would have had a full one third share of the valued property The course he took was evidently intended to be in favour of the appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before their Lordships by counsel for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of respondent 1 and to the detriment of the appellant In their Lordships view this is not an accurate summary but in any case there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the present case It is just to the arbitrator to say that, in their Lordships' view, the charges of dishonesty and partiality have entirely failed.

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Their Lordships agree with the judgement of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondents: *Watkins and Hunter.*

J. V. W.

P. C.* 1904 *April* 1, 7

ABDUL MAJID (JUDGEMENT-DEBTOR) *v* JAWAHIR LAL (DECREE HOLDER) AND OTHERS (JUDGEMENT DEBTORS)

[On appeal from the High Court of Judicature at Allahabad].

Privy Council, Practice of—Dismissal of appeal for want of prosecution—No judicial decision of suit—Act No XV of 1877 (Indian Limitation Act), schedule II, articles 179, 180—Application for order absolute for sale under Act No IV of 1882 (Transfer of Property Act), section 89—Final decree or order of appellate Court

An order of His Majesty in Council dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit, and can in no sense be regarded as an order adopting or confirming the decision appealed from It merely recognizes authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all.

Where, therefore, in a suit to enforce a mortgage a preliminary decree for sale was made by the Subordinate Judge on the 12th of May, 1890, which was confirmed by the High Court on the 8th of April, 1893, and an appeal to the Privy Council was admitted, but was dismissed for want of prosecution on the 13th of May, 1901 *Held* (reversing the decisions of the Courts in India) that the period of limitation for an application under section 89 of the Transfer of Property Act (IV of 1882) to make absolute the decree for sale was not 12 years under article 180 of schedule II of the Limitation Act, 1877, but three years under article 179, and limitation ran, not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the decree, which was the "the final order of the Appellate Court," and did not become merged in the order of the Privy Council (1)

The right to enforce the decree had therefore been barred before the passing of the Civil Procedure Code, 1908, (under which the present application purported to be made), and no provision of that Act operated to revive it

APPEAL No 27 of 1913 from a judgement and decree (5th August, 1910) of the High Court at Allahabad, which affirmed the judgement and decree (6th October, 1909) of the Court of the Subordinate Judge of Allahabad.

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* Present:—Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) See *Batuk Nath* v. *Munni Dei*, I. L. R., 36 All., 284

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The facts of this case are sufficiently stated in the report of the appeal to the High Court which was heard by Sir JOHN STANLEY, C J and BANERJI and CHAMIER, JJ, and will be found in I L R, 33 All 154

On this appeal—

G R Lowndes, for the appellant contended that the courts below were wrong in treating the application of the 11th of June, 1909, as one to enforce the order of the Privy Council, dated the 13th of May, 1901 That order did not purport to be, and ought not to be treated as, a decree in the suit deciding the rights of the parties under the mortgage, and was not capable of being enforced in execution as the decree-holder (the first respondent) sought to do It was not ' the final order of the Appellate Court ' within the meaning of article 179 clause 2, of schedule II to the Limitation Act, 1877 (which corresponded with article 182, clause 2, of schedule I, to the Limitation Act, 1908) The period of limitation was three years and it must be reckoned from the 8th of April, 1893, when the High Court confirmed the decree of the Subordinate Judge, and when the right to make the present application accrued. If the present application was an application for a decree under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, that is, if the Limitation Act 1908 was applicable, the application was equally barred by article 181, schedule I, of the last named Act The question was whether the application was one to obtain a decree or one for execution of a decree but in any view it was barred by limitation

De Gruyther, K C, and *B Dube*, for the first respondent, contended that the Code of Civil Procedure, 1908, was not applicable, see section 158 of that Code at page 487 of the commentaries on the Code by Woodroffe and Ameer Ali Such an application in the case of non mortgaged property would be under section 284 of the Code of Civil Procedure 1882 It was one to enforce a decree from which a further application can count for the purpose of the Limitation Act In this case the date from which limitation was to be reckoned was the date of the final order or decree of the appellate court which was the date of the order of the Privy Council dismissing the appeal for want of prosecution that was the 13th of May, 1901 [*Lowndes* referred to Starling on Limitation

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(5th edition 1911) page 509 where it is said that where an appeal is not prosecuted owing to its being struck off or withdrawn *without being heard* the date of the decree for the purpose of limitation was the date of the decree from which the appeal was brought] If a decree after the dismissal of an appeal for any reason needs amendment the application to amend it must be made to the Appellate Court the decree of the Appellate Court being the final order Reference was made to *Gobardhan Das* v *Gopal Ram* (1) *Kisto Kinkur Roy* v *Burrodacaunt Roy* (2) *Naurang Rai* v *Latif Chaudhri* (3), *Shivlal Kalidas* v *Jumaklal Nathji Desai* (4), *Nauchand* v *Vithu* (5) *Beni Rai* v *Ram Lakhan Rai* (6) which was the case of a deree of the High Court dismissing an appeal for non prosecution *Lachman Persad Singh* v *Kishun Persad Singh* (7) the decision of a Full Bench, and *Tasadduq Rasul Khan* v *Manik Chand* (8) which shows the decree of 'appeal dismissed' is an affirmation of the decree appealed from although precisely the same reasons may not be given No express period of limitation was prescribed by the Limitation Act for an application for a decree absolute for sale under section 89 of the Transfer of Property Act (IV of 1882) To this case the article of schedule II of the Limitation Act 1877 applicable was article 180 which allows a period of twelve years limitation and limitation ran from the 13th of May 1901 It was submitted therefore that the decisions of the courts below were right and the application was not barred by limitation

The appellant was not called upon to reply

1914 April 7th —The judgement of their Lordships was delivered by Lord MOULTON —

In this case the relevant facts necessary and sufficient to determine their Lordships decision on the appeal are very simple and are undisputed

The appellant is in the position of mortgagor and the respondents of mortgagees under a mortgage dated the 3rd of September

(1) (1885) I L R 7 All 366

(2) (1872) 14 Moo I A 465 (438 489) 10 B L R 101 (112)

(3) (1891) I L R 13 All 394

(4) (1893) I L R, 18 Bom 542

(5) (1894) I L R 19 Bom 258

(6) (1898) I L R 20 All, 367

(7) (1882) I L R 8 Calc 218

(8) (1902) I L R, 25 All. 109 L R 30 I A 35

1868 In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage and on the 12th of May, 1890 a decree was passed by him for the sale of the property unless payment was made on or before the 12th of August 1890 An appeal was brought from that decree to the High Court, and, on the 8th of April 1893 that appeal was dismissed and the decree of the Subordinate Judge confirmed The mortgagor obtained leave to appeal to this Board but did not prosecute his appeal, and on the 13th of May, 1901, the appeal was dismissed for want of prosecution

The present appeal relates to an application to the Subordinate Judge, dated the 11th of June 1909 for an order absolute to sell the mortgaged properties, in other words, for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of the 8th of April, 1893 It is not necessary to go into the particulars of this application because their Lordships are of opinion that any such application was barred by the Statute of Limitation article 179 at the expiry of three years from the date of the decree, and therefore before the passing of the Code of Civil Procedure of 1908 under which the present proceedings purported to be taken and their Lordships have no doubt whatever that inasmuch as the right to enforce the decree had once been barred no provisions of the Code of Civil Procedure 1908, operate to revive it

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of the 13th of May 1901 by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was twelve years from the 13th of May 1901, by virtue of article 180 of the Indian Limitation Act Their Lordships see no foundation for this contention which appears to have been the basis of the decision of the Courts below The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open

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to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th of April, 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that the application of the 11th of June 1909, should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

Appeal allowed.

Solicitor for the appellant:—*Douglas Grant.*

Solicitors for the respondent Jawahir Lal:—*Barrow, Rogers and Nevill.*

J. V. W.

REVISIONAL CIVIL.

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March, 31

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

CHATARBHUJ (PLAINTIFF) v. RAGHUBAR DAYAL (DEFENDANT).*

Arbitration—Jurisdiction—Power of court to supersede an arbitration proceeding under its orders before submission of award—Revision—Civil Procedure Code (1908), section 115, schedule II, paragraph 15.

Semble that the intention of the second schedule to the Code of Civil Procedure is that when once a reference to arbitration has been made under the orders of the court that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under paragraph 15, after the award has been received.

Even if a civil court possesses inherent jurisdiction to supersede an arbitration proceeding under its orders, such jurisdiction should be cautiously and sparingly exercised, and an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. The High Court can interfere in revision when the inherent jurisdiction of a court is exercised wrongly and with material irregularity. *Atlas Assurance Company* v. *Ahmedbhoy Habibbhoy* (1) not followed.

* Civil Revision No. 89 of 1913.

(1) (1901) I.L.R., 34 Bom., 1.

THE facts of this case were as follows:—

A suit was brought in the court of the Subordinate Judge of Agra which by consent of parties was referred to arbitration on the 28th of March, 1911 The arbitrator closed the case on the 11th of July, 1911 On the 20th of July, 1911, the defendant presented an application before the court asking it to revoke the order of reference The court fixed the 28th of July for hearing of this application and ordered that the plaintiff's pleader be informed of this fact. On the 28th of July, 1911, the court took up the application presented by the defendant and passed an *ex parte* order revoking the reference and took the case on to its own file An order was sent to the arbitrator to return all the papers connected with the case and the order reached the arbitrator on the 30th of July. The arbitrator sent in all the papers, among which was an award purporting to have been made on the 27th of July On the 8th of June, 1912, the court asked the plaintiff's pleader to tell his client to appear in person on the 20th of June, 1912, the date fixed for hearing of the case otherwise the suit would stand dismissed On the 20th June, 1912, the plaintiff filed an application to the effect that the court's order revoking the reference to arbitration was wrong and that it should proceed with the award according to law The Subordinate Judge rejected this application and dismissed the suit without hearing the parties. The plaintiff applied in revision to the High Court

Mr. *Nihal Chand*, for the applicant, submitted that the Subordinate Judge had no jurisdiction to revoke the order of reference according to schedule II, paragraph 3, clause (2), and paragraphs 5, 8 and 15 of the Code of Civil Procedure He referred to *Halimbhai Karimbhai* v *Shanker Sai* (1), *Jamna Kunwar* v *Nasib Ali* (2), *Perumalla Satyanarayana* v *Perumalla Venkata Rangayya* (3), *Sultan Muhammad Khan* v *Sheo Prasad* (4), *Chiddu* v. *Kunwar Sen* (5), *Abdul Hamid* v *Riaz ud din* (6), *Shiam Sundar Lal* v *Bhairon Singh* (7) *Pestonjee Nussurwanjee* v. *Manockjee and Co* (8), and to "The Law of Arbitration" by Durga Charan Banerji

(1) (1886) I L R, 10 Bom., 381
(2) (1902) I.L R, 24 All, 313
(3) (1903) I.L R, 27 Mad, 112
(4) (1897) I L R, 20 All, 145
(5) (1906) I L R, 29 All, 49
(6) (1907) I L R 30 All, 32
(7) (1906) Weekly Notes, 51
(8) (1868) 12 Moo I A., 112, 130

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In most of the aforesaid cases the reference to arbitration was without the intervention of court and the rulings laid down that even in such cases a party could not withdraw a reference to arbitration at his mere will and pleasure without a sufficient and just cause The cases reported in I L R 10 Bombay, page 381, and I L R 30 Allahabad, page 32 were direct authorities in favour of the plaintiff According to section 15 of schedule II a court should hold its hands till the award is challenged by either party The award having been given on the 27th of July was delivered before the order superseding the reference and was therefore not a nullity The proper procedure for the court below was to give notice of the award to the parties He referred to *Chaturbuj Das* v *Ganesh Ram* (1) and *Rangasami* v *Muttusami* (2)

The omission of the Subordinate Judge to have notice of the application of the 20th of July served on plaintiff's pleader was a material irregularity

Babu *Durga Charan Banerji* (for the Hon ble Dr *Tej Bahadur Sapru*) for the opposite side submitted that the lower court had jurisdiction to supersede the order of reference for just and sufficient cause The Legislature never contemplated that this Court in revision should interfere in matters in which a lower court has exercised a discretion as to the sufficiency or otherwise of the ground on which that court acted Further the courts possess an inherent power which entitles them to revoke a reference in the interest of justice He referred to *Chiddu* v *Kunwar Sen* (3) *Mahomed Wahiduddin* v *Hakiman* (4) and *Atlas Assurance Company* v *Ahmedbhoy Habibbhoy* (5)

The plaintiff has taken a long time in coming before this Court and the effect is that the defendant's objection for setting aside the award would now be time barred under article 158 schedule I, of the Limitation Act

PIGGOTT, J —The revisional jurisdiction of this Court is being invoked by a plaintiff whose claim for a sum of Rs 1 200 plus interest has been dismissed by the Additional Subordinate Judge of Agra under somewhat peculiar circumstances The suit having

(1) (1898) I L R 20 All 474
(2) (1887) I L R 11 Mad. 144
(3) (1900) I L R. 23 All. 40
(4) (1902) I L R, 29 Calc 278
(5) (1908) I L R, 34 Bom., 1

been duly instituted was referred to arbitration by an agreement under paragraph 1 of the second schedule to the Code of Civil Procedure The arbitrator had been directed to submit his award by the 8th of August 1911 On the 20th of July, 1911, the defendant presented to the court an application supported by affidavit, asking the court to supersede the arbitration on the ground that he had lost confidence in the fairness and impartiality of the arbitrator. The court directed that this application should come up for orders on the 28th of July, 1911, after notice to the plaintiff's pleader. It did not take the precaution of issuing orders to the arbitrator to suspend his proceedings pending the disposal of the said application It is a matter for controversy whether the plaintiff's pleader did or did not receive notice The record does not show that he did and on the date fixed (July 28th 1911) the matter was actually heard and disposed of *ex parte* The court had no materials before it except the affidavit filed along with the application of the 20th of July 1911 and this affidavit is very badly drafted and does not bind down the deponent to affirming anything material as of his own personal knowledge The court however, contented itself with taking note of the fact that no one appeared to contest the application and thereupon passed an order superseding the arbitration and fixing a date for proceeding with the suit It at the same time issued an order to the arbitrator directing him to send in all papers connected with the proceedings before him It would seem that this order reached the arbitrator on the 30th of July, 1911, and his reply reached the court on the 1st of August, 1911 He sent in a large number of papers, and with the rest an award in favour of the plaintiff for Rs 1,200 plus a certain amount of interest, the said award purporting to be dated the 27th of July 1911

The plaintiff went up to this Court in revision against the order of 28th of July 1911 but a Bench of this Court held that no case had yet been decided within the meaning of section 115 of the Code of Civil Procedure and that there could be no interference at this stage

By the time the learned Subordinate Judge came to take up the suit again it would seem that he was beginning to entertain an impression unfavourable to the plaintiff's conduct of the case, at

any rate he passed a peremptory order requiring the personal attendance of the plaintiff on the next date fixed for hearing The case then came up on the 20th of June, 1912, the plaintiff being represented by a pleader, but not appearing in person as directed His pleader put in three applications one after the other, all of which were rejected by the Court One at least of these applications was very improperly worded and I feel compelled to place on record the impression left on my mind by a perusal of the proceedings of that date that there was some loss of temper on both sides A mere inspection of the order by which the learned Subordinate Judge finally dismissed the plaintiff's suit suggests that it was written in haste and in some agitation of mind The order as passed does not specify under what provisions of the Code of Civil Procedure it purports to be passed and it certainly seems open to argument whether the court intended to apply the provisions of order XVII, rule 2 or those of order IX, rule 12 of the Code of Civil Procedure When a court comes to the conclusion that a plaintiff before it has so mismanaged his case that, whatever may be the merits of his claim it is right and proper that his suit should be dismissed without an adjudication on the merits, it is most desirable that the court should itself pause to consider, and should place clearly on record the precise provisions of the law under which it proposes to act The plaintiff appealed to the District Judge against the order of dismissal but the District Judge held the order to have been passed under order IX, rule 12 of the Code of Civil Procedure and not to be open to appeal The question of the propriety of the District Judge s order is not before us and there has been no argument on the point I mention the matter only by way of explaining the unsatisfactory position into which the litigation has now got and as accounting for the plaintiff's delay in bringing the matter before this Court in revision

The plaintiff s contention now is that the Subordinate Judge s order of the 28th of July, 1911, superseding the arbitration was either altogether without jurisdiction or at any rate was vitiated by such material irregularity as to make it a proper subject for interference by this Court in revision If this order be set aside, it is further contended that the Subordinate Judge had no jurisdiction to proceed with the suit himself, and that all his subsequent

orders, up to and including the order dismissing the suit are equally without jurisdiction It is further suggested that we should quash this order of dismissal, and remand the case to the court below, with directions that it should take cognizance of the arbitrator's award in favour of the plaintiff, and either pass a decree in the terms of that award, or consider whether it is open to it, at this stage, to pass an order setting aside the award under paragraph 15 of the second schedule to the Code of Civil Procedure

We were taken in argument through a great deal of the voluminous case-law on the subject, but most of the cases cited seem to me but remotely relevant to the facts before us It is settled law that, in the case of an agreement to refer to arbitration come to out of court, neither party can revoke the agreement at his own will and pleasure, but either party may do so for good and sufficient cause, and various cases have arisen in which the courts have been called upon to inquire into the validity or sufficiency of the cause alleged for revoking such an agreement It was conceded before us in argument that a reference to arbitration made under the orders of the Court cannot be terminated by a mere revocation on the part of the plaintiff or defendant, but can only be superseded by an order of the court The second schedule to the Code of Civil Procedure specifies certain cases in which the court may supersede a reference to arbitration made under its orders, the fact that one of the parties concerned has lost faith in the fairness or impartiality of the arbitrator is nowhere laid down as a valid ground for superseding the arbitration Corruption or misconduct on the part of the arbitrator is a good ground for setting aside the award after the same has been received but it is nowhere laid down that the court is authorized to take cognizance during the pendency of the arbitration, of an allegation that the arbitrator is corrupt or partial, or is misconducting himself so as to suspend the proceedings in arbitration and if satisfied of the truth of the allegation to supersede the arbitration before any award has been received. It is contended that the court must be presumed to have inherent jurisdiction to do both these things, for good cause shown The learned advocate for the defendant in this case who is himself a most distinguished

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authority on the subject of the law of arbitration, could only refer us to one reported case *Atlas Assurance Company* v *Ahmedbhoy Habibbhoy* (1) where this proposition was definitely laid down I must confess to grave doubts on the point The learned Judge of the Bombay High Court speaks of the necessity of protecting a party from "multiplied expenses' and interminable delays' on the part of the arbitrator With all respect for his opinion, I suggest that in an arbitration conducted under the orders of the court (and this is the case with which we are now dealing) the court has very large powers of control Against 'interminable delays at any rate, it can provide at once by its order specifying the period within which the award is to be returned It seems to me unsound on general principles to invoke the inherent jurisdiction" of the court in a matter for which provision appears to be made in the Code itself I am by no means satisfied that the intention of the second schedule to the Code of Civil Procedure is not, that when once a reference to arbitration has been made under the orders of the court, that reference should only be superseded for one of the reasons given in the schedule itself and that allegations of corruption or misconduct against the arbitrator should be left to be dealt with under paragraph 15 *after the award has been received*

I should be quite content however, to dispose of the matter now before us on the principles laid down by Mr Justice Davar in *Atlas Assurance Company* v *Ahmedbhoy Habibbhoy* The 'inherent jurisdiction' of the court, if it can be called into play at all in this fashion while the arbitration is pending should be, "cautiously and sparingly exercised and only when it is obvious that the ends of justice would not be met by requiring the dissatisfied party to wait and see what the award might be and then to assail it on the ground of corruption or misconduct if satisfied that such allegations can be made out An application to a court to *interfere with an arbitration proceeding pending under its orders* should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken In the present case the learned Subordinate Judge seems to me to have taken action on an unsatisfactory application supported by

(1) (1908) I L.R 34 Bom. 1

a worthless affidavit Having decided to entertain that application, he did not at once issue orders to the arbitrator to suspend his proceedings pending inquiry, he did not cause notice of the application to be formally served on the opposite party, he superseded the arbitration with no legal evidence before him of any one single fact justifying his interference, and he did so by an *ex parte* order which was not prefaced by any finding that the plaintiff or his pleader had notice of the date fixed for hearing the defendant's application.

Now we are dealing in this case with an order which was admittedly not within the jurisdiction of the court below under any of the provisions of the Code of Civil Procedure which deal specifically with the whole question of submissions to arbitration The order can only be justified if at all by invoking the inherent jurisdiction of the court Under these circumstances I do think that it is both proper and necessary that this Court having the record before it in revision should consider the circumstances under which that inherent jurisdiction was invoked and the manner in which it was exercised In my opinion it was invoked under circumstances which did not call for its exercise and was exercised "with material irregularity"

I think that if we set aside this order of the 28th of July 1911 and all subsequent orders in the case as passed without jurisdiction, we can direct the court below to take up and consider the question of the validity of the award It was suggested in argument that the provisions of article 158 of the first schedule to the Indian Limitation Act (Act IX of 1908) would prevent this In reply to this I hold that the defendant's application of the 20th of July 1911, was though premature and irregular in form in substance a plea of corruption and misconduct against the arbitrator The court would have jurisdiction to take cognizance of it as an objection against the award and to do so on the date on which it takes cognizance of the award itself I would hold further that the award though received by the court on the 1st of August 1911 has not, in consequence of the mistaken order of the 28th of July 1911 been legally before the court at all up to this present date That court should therefore take cognizance of it on the date on which it receives back the record from this Court issue

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notice of the same to the parties, and allow ten days for objections in case the defendant desires to file further objections It may be a matter for inquiry whether the award was really made on the date which it purports to bear, as it would certainly amount to misconduct on the arbitrator's part if he made the award after the court's order of the 28th of July, 1911, reached him, and purposely antedated it

For these reasons, I would set aside the order dismissing the plaintiff's suit, as well as the order superseding the arbitration, and remand the case to the court below with directions as suggested above

RAFIQ, J —I concur

BY THE COURT —The order of the Court is that the order of the lower court dismissing the plaintiff's suit, as also the order superseding the arbitration is set aside, and the case is remanded to the court below to consider the validity of the award and to dispose of the suit according to law The costs of this application will be costs in the suit

Application allowed.

REVISIONAL CRIMINAL

1914
April 2

Before Mr Justice Piggott

EMPEROR v MUHAMMAD ISHAQ *

Act No XLV of 1860 (Indian Penal Code) sections 52 191 and 193—Perjury—Verification of application for execution containing statements in fact untrue—Good faith

A man cannot be convicted of perjury under section 193 of the Indian Penal Code for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true It must be found that he made some statement which he knew to be false or which he believed to be false or which he did not believe to be true and this finding should be arrived at independently of the definition of 'good faith' in section 52 of the Code

ONE Muhammad Ishaq presented to the Court of Small Causes at Benares an application for execution of a decree, duly verified according to law, stating that a decree had been passed on a certain date by the Court of Small Causes in his favour for a certain sum of money against one Bhola Sahu As a matter of fact on the

* Criminal Revision No 185 of 1914 from an order of B J Dalal, Sessions Judge of Benares dated the 7th of March, 1914

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date in question no decree had been passed in the applicant's favour against Bhola Sahu although a suit was pending which ended later on in a decree in his favour neither was the decree when passed for the exact sum named in the application for execution Muhammad Ishaq was convicted under section 193 of the Indian Penal Code in respect of the verification of the application and applied in revision to the High Court

Mr *G P Boys* for the applicant

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown.

PIGGOTT J—This is an application in revision by one Muhammad Ishaq who has been convicted of an offence under section 193 Indian Penal Code in that he presented before the Court of Small Causes of Benares an application for execution of a decree duly verified according to law which contained over the said verification allegations of fact which were not true So far the case for the prosecution has been fully made out Muhammad Ishaq did present an application for execution in which he stated that a decree had been passed by the very court to which he was applying in his favour for a certain sum of money against Bhola Sahu It appears that on the date in question no decree had been passed in favour of Muhammad Ishaq against the defendant Bhola Sahu although a suit was pending which ended later on in a decree in favour of Muhammad Ishaq This decree again was not for the precise sum alleged in Muhammad Ishaq s application for execution The Magistrate who tried the case in the first instance has discussed the defence set up by Muhammad Ishaq in a manner which clearly shows that he was labouring under a misapprehension as to the law applicable to the case Muhammad Ishaq s plea was that he stated nothing in the verification in question which he did not believe to be true at the time that he presented his application thus verified to the court The Magistrate refers to the provisions of section 52 of Indian Penal Code and remarks that on Muhammad Ishaq s own showing there was an absence of due care and attention on his part and that he cannot be said to have believed *in good faith* that a decree had been passed in his favour for the sum alleged because a very little inquiry would have shown him that no such decree had been passed The learned Sessions Judge does not refer to section 52

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Indian Penal Code, in his judgement, but he says that the question in issue is whether Muhammad Ishaq acted in good faith, under a *bonâ fide* mistake This remark suggests that the provisions of section 52 were also in the mind of the learned Sessions Judge when he dismissed Muhammad Ishaq s appeal Now the offence which is punishable under section 193 Indian Penal Code is defined by section 191 of the same Code That definition shows that it lay on the prosecution to prove not merely that this verification made by Muhammad Ishaq covered statements which were false in fact but that in making these statements Muhammad Ishaq either knew or believed the same to be false or did not believe the same to be true There has to be a finding against the accused on this point before the conviction under section 193 Indian Penal Code, can be affirmed This finding must be arrived at independently of the definition of "good faith contained in section 52 Indian Penal Code A man cannot be convicted of perjury for having acted rashly or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true It must be found that he made some statement or statements which he knew to be false or which he believed to be false or which he did not believe to be true If I rightly understand the judgements of the two courts below there has not been any finding against Muhammad Ishaq on this essential point The Magistrate s finding certainly amounts to no more than this that Muhammad Ishaq may have believed the statements made in his verification to be true but that if he did he believed this without due care and attention In coming to this Court in revision Muhammad Ishaq has confined himself to a plea against the severity of the sentence I take it that so far as he is personally concerned he would be prepared to submit to the fine of Rs 20 as a punishment for his rash and careless action but he applies to this Court to relieve him from the sentence of imprisonment The case having come before me and the record having been examined by me according to law, I am unable to deal with the matter with reference merely to the wishes of the applicant A man should not be convicted of perjury for having been rash or credulous and the conviction in this case is in my opinion based upon an error of law I accordingly set aside the conviction and the sentence acquit Muhammad Ishaq of the offence charged and

direct that his security be discharged and the fine, if paid, be refunded

Conviction set aside

APPELLATE CIVIL.

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji.

BAHADUR SINGH (PLAINTIFF) v SHIAM SUNDAR TUG (DEFENDANT) *

Company—Sale of shares—Bond given for price—Unauthorized refusal of manager to register transfer—Suit on bond—Plea of non registration of transfer not open to defendant

A sold to B certain shares in a company and B instead of paying the price in cash executed a bond therefor in favour of A Registration of the transfer was refused by a person describing himself as the chief manager of the company who however, did not appear to have any authority under the articles of association to refuse to register a transfer of shares

Held on suit by A on the bond that it was not competent to B to plead as a defence that the transfer of the shares purchased by him had not been registered, as there had in fact been no refusal to register by the company

THE facts of this case were as follows —

The plaintiff transferred 10 deferred shares in the Indian Co-operative Bank, Limited, to the defendant on the 18th of April, 1911, for Rs 500, and in lieu thereof the defendant executed a bond in favour of the plaintiff on the same date The articles of association of the Bank which were in force on the 18th of April, 1911, had the following provision in regard to transfers —

"The Company may decline to register any transfer of shares made by a member indebted to it or on which the Company may have a lien and the Company may also decline to register any transfer to any transferee not approved of by the directors, and they shall not be required to assign any reason for refusing such transfer"

On the 8th of August, the plaintiff instituted the present suit on foot of the bond On the 19th of August the Bank at a meeting adopted a new set of articles of association and resolved that "they shall have retrospective effect" In the new articles in

* Second Appeal No 95 of 1913 from a decree of I B Mundle Additional District Judge of Bareilly dated the 23rd of November 1912 reversing a decree of Abdul Halim Munsif of Bareilly dated the 20th of March, 1912.

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Indian Penal Code, in his judgement; but he says that the question in issue is whether Muhammad Ishaq acted in good faith, under a *bonâ fide* mistake. This remark suggests that the provisions of section 52 were also in the mind of the learned Sessions Judge when he dismissed Muhammad Ishaq's appeal. Now the offence which is punishable under section 193, Indian Penal Code, is defined by section 191 of the same Code. That definition shows that it lay on the prosecution to prove, not merely that this verification made by Muhammad Ishaq covered statements which were false in fact, but that in making these statements Muhammad Ishaq either knew or believed the same to be false, or did not believe the same to be true. There has to be a finding against the accused on this point before the conviction under section 193, Indian Penal Code, can be affirmed. This finding must be arrived at independently of the definition of "good faith" contained in section 52, Indian Penal Code. A man cannot be convicted of perjury for having acted rashly, or for having failed to make reasonable inquiry with regard to the facts alleged by him to be true. It must be found that he made some statement or statements which he knew to be false, or which he believed to be false, or which he did not believe to be true. If I rightly understand the judgements of the two courts below, there has not been any finding against Muhammad Ishaq on this essential point. The Magistrate's finding certainly amounts to no more than this, that Muhammad Ishaq may have believed the statements made in his verification to be true, but that, if he did, he believed this without due care and attention. In coming to this Court in revision Muhammad Ishaq has confined himself to a plea against the severity of the sentence. I take it that, so far as he is personally concerned, he would be prepared to submit to the fine of Rs. 20 as a punishment for his rash and careless action, but he applies to this Court to relieve him from the sentence of imprisonment. The case having come before me, and the record having been examined by me according to law, I am unable to deal with the matter with reference merely to the wishes of the applicant. A man should not be convicted of perjury for having been rash or credulous, and the conviction in this case is in my opinion based upon an error of law. I accordingly set aside the conviction and the sentence, acquit Muhammad Ishaq of the offence charged and

direct that his security be discharged and the fine, if paid, be refunded

Conviction set aside

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APPELLATE CIVIL.

1914 April, 9

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji.

BAHADUR SINGH (PLAINTIFF) v. SHIAM SUNDAR TUG (DEFENDANT) *

Company—Sale of shares—Bond given for price—Unauthorized refusal of manager to register transfer—Suit on bond—Plea of non registration of transfer not open to defendant

A sold to B certain shares in a company and B instead of paying the price in cash executed a bond therefor in favour of A. Registration of the transfer was refused by a person describing himself as the chief manager of the company who however, did not appear to have any authority under the articles of association to refuse to register a transfer of shares

Held on suit by A on the bond that it was not competent to B to plead as a defence that the transfer of the shares purchased by him had not been registered, as there had in fact been no refusal to register by the company

THE facts of this case were as follows —

The plaintiff transferred 10 deferred shares in the Indian Co-operative Bank, Limited, to the defendant on the 18th of April, 1911, for Rs 500, and in lieu thereof the defendant executed a bond in favour of the plaintiff on the same date. The articles of association of the Bank which were in force on the 18th of April, 1911, had the following provision in regard to transfers —

"The Company may decline to register any transfer of shares made by a member indebted to it or on which the Company may have a lien and the Company may also decline to register any transfer to any transferee not approved of by the directors and they shall not be required to assign any reason for refusing such transfer'

On the 8th of August, the plaintiff instituted the present suit on foot of the bond. On the 19th of August the Bank at a meeting adopted a new set of articles of association and resolved that "they shall have retrospective effect' In the new articles in

* Second Appeal No 95 of 1913 from a decree of I. B. Mundle, Additional District Judge of Bareilly dated the 23rd of November 1912 reversing a decree of Abdul Halim Munsif of Bareilly dated the 20th of March, 1912.

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addition to the old clause about transfer of shares there was a further clause to the following effect —

"A director of the Bank cannot transfer his qualification shares till he has resigned his directorship and his resignation has been accepted by the Board"

In the meeting of the 19th of August, the Bank also passed a resolution delegating to one Mr Sidheshwar Ghose, director and chief manager, "the power of allotting, transferring and accepting surrender of shares"

On the 21st of August, the said director and chief manager passed an order refusing to register the transfer executed by the plaintiff in favour of the defendant on the 18th of April, on the ground that the plaintiff was a director and the shares transferred were his qualification shares, and on the further ground that some calls were due from the plaintiff on an ordinary share which he held in the Bank It was also said in a general way that there were other reasons, but the Bank cannot be required to assign reasons for refusing to register transfers

The defendant filed a written statement on the 22nd of January, 1912, and his defence was twofold, firstly, that the bond was executed under undue influence and, secondly, that the Bank not having agreed to the sale of shares the plaintiff continued to be their owner and therefore the bond was without consideration.

The court of first instance decreed the suit The lower appellate court dismissed it, holding that the consideration had failed Both the courts below repelled the plea of undue influence

The plaintiff appealed to the High Court

Babu *Sarat Chandra Chaudhri*, for the appellant —

The lower appellate court has taken a wrong view of the case On the date when the sale to the defendant was made the plaintiff was in no way incompetent to transfer his shares Even assuming the plaintiff to have been a director of the Bank, the articles of association on that date did not impose restrictions of any sort or description upon the power to transfer The defendant complains that he was not registered and the Judge holds that that fact constitutes a failure of consideration. It is submitted that it is the purchaser's duty to get himself registered, the vendor is only to assist him Reference was made to the Indian Companies Act, 1882

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section 29, and *The Muir Mills Co, Ld* v *T. H Condon* (1) As between the vendor and the purchaser the title of the latter is complete as soon as he accepts the transfer From that date the purchaser becomes the equitable owner of the share entitled to all the rights and subject to all the obligations incidental to such ownership The law is clear on the point *Lindley on Companies*, Ed 6, pp 679 and 680 It is further submitted that the articles of association passed after the date of the sale (in fact after the suit) cannot be made to have retrospective operation so as to affect a transfer made long prior to their date. Under the new articles a director is declared incompetent to transfer his qualification shares without resigning his directorship and until his resignation is accepted by the Company The provision so made is not in accordance with law, for the law does not render such a transfer void or illegal A director transferring his qualification shares *ipso facto* ceases to be a director Even according to the new articles, it is submitted, there is nothing which renders the sale inoperative *Halsbury's Laws of England*, Vol V, p 186, section 309 It is submitted, therefore, that unless the registration is refused on the ground that the transferor has no right to transfer, the transferee must pay the price At the date of sale, the plaintiff was in no way disqualified from selling his shares The decree of the lower appellate court is, therefore, wrong and cannot be sustained

Babu *Purushottam Das Tandon*, for the respondent —

I support the decree on two grounds, first, that the consideration failed and, secondly, that the transferor had no right to transfer According to schedule I, article 8, of the Indian Companies Act the transferor continues to be the owner so long as the name of the transferee is not entered in the books of the Company He will receive all the profits on the shares, in fact for all purposes as between the Company and himself he is the owner The right to transfer is not an absolute right it is subject to certain conditions imposed by the articles of association The transfer is not complete without registration It is true that the amended articles were passed after the transfer deed had been executed, but the resolution which accepted the new articles

(1) (1900) I L R, 22 All., 410, 412

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also gave it a retrospective effect. Whether the Board should or should not have passed such a resolution is not a matter for consideration here. The material fact is that acting upon that resolution the Board has disallowed the transfer. So the transferee gets nothing and the consideration has failed. If the new articles are binding the transferor had no right to transfer the shares, for they were his qualification shares as a director. Even if the new articles did not affect the transaction, the company could under the old articles refuse to register a transfer without giving any reasons. The transfer was with a warranty that the transferor had a right to sell. But as a matter of fact the seller had not an absolute right to sell for the sale was subject to the approval of the directors. The sale could be completed only after the registration of the transfer. The purchaser whether he paid cash or gave a bond purchased, not the paper on which the transfer deed was executed, but something more substantial, viz. the rights and status of a shareholder. The power to refuse to register a transfer had been delegated to the chief manager by the Board by their resolution of the 19th August. The words are "the power of allotting shares, transfering shares and accepting surrender of shares." They imply the right to refuse to register a transter.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit brought under the following circumstances:—The plaintiff was the registered holder of certain shares in a concern known as the Indian Co-operative Bank, Limited. On the 18th of July, 1911, the plaintiff executed a deed of transfer of the shares to the defendant in consideration of Rs. 500. On the same date the defendant executed a bond in favour of the plaintiff whereby, after reciting that the defendant was indebted to the plaintiff in the sum of Rs. 500, being the price of the shares transferred to him, he covenanted to pay Rs. 500 with interest at 12 per cent. per annum. The money has not been paid, and the plaintiff instituted the present suit to recover the amount due under the bond. The defendant pleaded, first, that the transfer and the bond were obtained from him by undue influence and, secondly, that there had been a failure of consideration inasmuch as the company had refused to recognize the transfer and register the transferee as

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the holder of the shares The court of first instance decreed the claim. The lower appellate court while finding that there was no undue influence, dismissed the suit on the ground of failure of consideration. The exact circumstances under which the transfer and the bond were executed have not transpired If we were to speculate on the matter we might probably think that the plaintiff was anxious to get rid of his shares, and that he brought some pressure on the defendant who was the managing director of the concern to take the shares from him When we use the word 'pressure' we do not necessarily mean "illegal pressure' The defendant contends that the company refused to recognize the transfer Under the deed of transfer the plaintiff never undertook to obtain the recognition of the transfer by the company On the face of the contract of transfer the transferor was immediately entitled to receive the sum of Rs 500 and the bond in suit was given to secure the indebtedness of the defendant to the plaintiff for the value of the shares There is an endorsement on the deed of transfer under the hand of a person by the name of Sidheshwar Ghose who is described as the Chief Manager of the company After citing a large number of legal rulings he declined for various reasons to register the transfer He purported to do this on the delegated authority of the directors We have looked at the resolution which is relied on as giving this authority and we find that no authority to refuse to register shares was conferred upon him It thus does not appear that the company ever refused to recognize the transfer Refusal could only be by a resolution of the company in pursuance of the articles of association

It is then contended that the plaintiff was himself a director of the company and that the shares which he purported to transfer were the shares which he held as qualification shares for his being a director In the articles of association which were in force at the time of the transfer there is nothing to prevent a director from transfering his shares New articles of association are said to have been adopted subsequently with retrospective effect The provisions of some of these new articles of association are very suspicious but even if we assume that the new articles of association were legally adopted they could not

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apply to the transfer, which had been made long before they came into operation.

The defence fails, so far as it is based on the allegation of undue influence, on the finding of fact by the court below.

In our opinion, there was no failure of consideration. This being so the appeal must be allowed. We, accordingly, set aside decree of the court below and restore the decree of the court of first instance with costs

Appeal allowed.

1914
April, 9

Before Mr. Justice Muhammad Rafiq and Mr Justice Piggott

BALKARAN UPADHYA AND OTHERS (DEFENDANTS) *v.* GAYA DIN KALWAR AND OTHERS (PLAINTIFFS) AND AISHA BIBI AND OTHERS (DEFENDANTS) *

Amendment of plaint—Limitation—Power of court to allow amendment—Fresh relief claimed in respect of which a suit would have been time barred

A deed of mortgage purported in the first place to mortgage with possession certain specified plots of *sir* and *khudkasht* land. There was, however, a stipulation in the mortgage-deed that, if the mortgagees failed to obtain possession under the deed or were disturbed in their possession, they would be entitled to recover their money from the mortgagors, and this either by sale of the mortgaged plots, or by sale of the *zamindari* share to which these plots appertained or from the persons and the property of the judgement-debtors A suit was filed just within the extended period of limitation allowed by section 31 of Act No IX of 1908 for sale of the specified plots After the period of limitation, however, had expired the plaintiffs applied for leave to amend the plaint and asked for sale of the *zamindari* share The court below allowed the amendment.

Held that the court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause had expired *Muhammad Sadiq* v *Abdul Majid* (1) distinguished.

THIS was a suit for sale under a mortgage, dated the 24th of May, 1893 The suit was brought on the 23rd of May, 1910, and the plaintiffs therefore had to take advantage of the special limitation granted by section 31 of Act No IX of 1908 The mortgage on the face of it was a mortgage with possession of certain specific plots of *sir* and *khudkasht* land; but it further contained a stipulation to the effect that, if the mortgagees failed to obtain possession under the deed, or were disturbed in their possession, they were to be entitled to sue the mortgagors for the recovery of the

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* Second Appeal No 403 of 1913, from a decree of L Marshall District Judge of Jaunpur, dated the 9th of January, 1913, confirming a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated the 29th of February, 1912

(1) (1911) I L R, 33 All., 616.

mortgage money, and in such a suit might ask for sale either of the specific plots mortgaged or of the zamindari shares to which these plots appertained or might recover the money from the persons and other property of the mortgagors The suit as brought was for sale of the specific plots, but it was subsequently found that for various reasons a decree could not be obtained against these and the plaintiffs accordingly asked for and obtained leave to amend their plaint by adding a prayer for sale of the zamindari *share* The court of first instance gave the plaintiffs a decree against some of the defendants and dismissed the suit as against the others and on appeal this decree was affirmed The defendants appealed to the High Court

Dr *S M Sulaiman* for the appellants

Pandit *Baldeo Ram Dave* for the respondents

MUHAMMAD RAFIQ and PIGGOTT, JJ —This is a second appeal by certain defendants in a suit for sale upon a mortgage The mortgage was one dated the 24 h of May 1893 and it was some what peculiar in its provisions The mortgagors Bhole Khan and Faulad Khan were said to be the proprietors of a certain share in a *mahal* known as that of Bhole Khan in mauza Chak English Zorawar Khan There was a further re ital to the effect that the *sir* and *khudkasht* lands in this *mahal* were divided by private arrangem nt amongst the co sharers and that certain specified plots had been assigned under this arrangement to the mortgagors The deed purported in the first place simply to mortgage specified plots of *sir* and *khudkasht* land with possession in return for the money advanced as consideration for the deed There was how ever a stipulation to the effect that if the mortgagees failed to obtain possession under the deed or were disturbed in their possession they were to be entitled to sue the mortgagors for the recovery of their money and that in respect of the suit for recovery of money they might exercise any one of three alternative reliefs they might enforce their claim for their money against the specified plots of lands mortgaged with possession under the deed or they might re over the money from the persons or other property of the mortgagors or they might recover it from the *zamindari* share of one anna to which the specified *sir* and *khud kasht* lands were alleged to appertain This suit was brought on

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the 23rd of May, 1910 that is to say, just about seventeen years after the date of the deed and the plaintiffs claimed to be within limitation by virtue of the special provisions of section 31 of the Indian Limitation Act No IX of 1908 In the suit as brought the relief claimed was to recover the principal and interest by bringing to sale the specified plots of land set forth in the mortgage A large number of defendants were impleaded besides the original mortgagors there having been in the interval both a number of transfers and a partition of the *mahal* in question We are concerned with the defence set up by four of the defendants who are now the appellants before us The case for these defendants in their written statement as originally filed was that they were not in possession of and had no interest in, any of the plots of land sought to be sold under the plaintiff's claim and that consequently they had been unnecessarily impleaded as parties to the suit At a considerably later stage it became clear to the plaintiffs that the suit as brought could not succeed without some sort of amendment of the plaint This much at any rate, was certain that there had been a partition in the year 1312 Fasli by which the private distribution of *sir* and *khudkasht* lands amongst the co sharers of the *mahal* as it had existed in 1893 was completety set aside and the particular plots specified in the mortgage deed had been assigned to co sharers other than the original mortgagors Indeed some of them had been assigned to the plaintiffs themselves who were also co sharers in the *mahal* Accordingly the plaintiffs on the 4th of January 1912 applied for permission to amend the plaint in various ways They referred to this partition of 1312 Fasli and stated that the original mortgagors had received certain specified plots of land in exchange for those set forth in the mortgage-deed They also explained that in consequence of the partition the original share of one anna referred to in the mortgage-deed had become a share of one anna seven pie four krant They now asked the court to give them a decree for the principal and interest of their mortgage-debt, recoverable by sale, both of the above mentioned share of one anna seven pie, four krant, and of certain specified plots of land which they alleged the mortgagors had received in exchange for those set forth in the mortgage-deed. After the

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plaint had been amended, the defendants who are now the appellants before us filed a fresh written statement in the course of which they challenged the plaintiffs to prove that the mortgage-deed in suit had been executed for valid consideration It also became clear at some later stage of the proceedings that the plaintiffs could not, under the terms of the deed itself, ask for a decree both against the specified plots of land and the *zamindari* share The court accordingly asked the plaintiffs to make a definite election between the two. The plaintiffs replied that, if the court was of opinion that they were not entitled to a decree against both, then they would prefer to have a decree against the zamindari share only. This was done by an application, dated the 29th of February, 1912, being the very date on which the suit was decided by the court of first instance. The learned Munsif gave the plaintiffs a decree for principal and interest recoverable by sale of a one anna, seven pie, four krant zamindari share, which is in the possession of these defendants who are now the appellants before us An appeal against this decree was filed in the court of the District Judge and a large number of pleas were entered in the memorandum of appeal, including certain pleas impeaching the order of the first court by which the amendment of the plaint had been permitted It appears, however, from the order of the learned District Judge on appeal that the only points pressed before him were whether the consideration for the deed in suit had been paid to the original mortgagors, and whether the plaintiffs had or had not obtained possession of certain plots of *sir* and *khudkasht* lands in accordance with the terms of mortgage-deed These points were decided by the lower appellate court in favour of the plaintiffs, and it was noted in the judgement that the other points raised in the memorandum of appeal "had been dropped" In the second appeal now before this Court the defendants appellants again challenge the order of the first court permitting the amendment of the plaint, and they contend further that the finding with regard to the passing of consideration is vitiated by the fact that the burden of proof had been wrongly laid on the defendant. With regard to this latter point reference is made to a ruling of this Court in *Bihari* v. *Ram Chandra* (1), which has been

(1) (1911) I L.R., 33 All., 453.

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discussed by the learned District Judge also There can be no doubt that there is something peculiar and open to suspicion in the conduct of the plaintiffs in having refrained from bringing any suit on this mortgage deed for so long a period as seventeen years The court might have been entitled to infer from this delay, with reference to the terms of the deed and the circumstances of the case generally, either that there had been failure of payment of the consideration or that the plaintiffs must in some way or other have enjoyed their interest, for part at any rate of the period in question by separate possession over some of the plots of *sir* or *khudkasht* land Moreover, the inference to this effect would be strengthened by consideration of the fact that the plaintiffs during the partition proceedings of 1312 Fasli never raised any question about their rights under the mortgage deed in suit, even though some of the plots specified in this deed were actually assigned to them as part of their share on partition. The learned District Judge might in our opinion have assigned greater weight to these considerations and put the plaintiffs to strict proof, both of the passing of consideration and as to their having failed to obtain possession under the terms of the mortgage deed We notice that on this latter point the District Judge has remarked that the the defendants failed to prove that the plaintiffs had not obtained possession under the deed The burden of proof in our opinion lay clearly on the plaintiffs, inasmuch as their failure to obtain possession was a condition precedent to their title to bring a suit for sale at all However, the case being now before us in second appeal and the finding as to the plaintiff's failure to obtain possession not being challenged in the memorandum of appeal before us we should be reluctant to interfere with the decision of the lower appellate court on these grounds, if they stood alone We mention them chiefly in order to show that the equities of the case are at least doubtful There remains for consideration the question of the amendment of the plaint, and here it appears to us that both the courts below have entirely overlooked the question of limitation when they permitted the plaint to be amended in the way in which they did. We have been referred to a ruling of this Court in *Muhammad Sadiq* v *Abdul Majid* (1) It was there

(1) (1911) I L R, 33 All, 616

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laid down that in view of the wide discretion allowed by the Code of Civil Procedure in the matter of the amendment of pleadings, the High Court will be slow to interfere in appeal with the exercise of this discretion but that no court has power to allow a new cause of action to be introduced into a plaint after that cause of action has become barred by limitation On the particular facts of this reported case the learned Judge of this Court held that there had not been anything like the introduction of a new cause of action but only an amendment in the description of the property in suit Now the essential question seems to us to be whether the same could be said of the suit before us It must be remembered that the mortgage-deed in suit is a very peculiar one Stipulations giving the mortgagees alternative remedies such as we find in the deed before us are certainly unusual The plaintiffs have whatever may have been their reasons, delayed the institution of this suit until the period of limitation was running out They brought this suit on a deed which allowed them two or three alternative reliefs and on the suit as framed they expressly claimed to enforce one of those reliefs only, namely the recovery of their money by sale of the specified plots mentioned in the instrument of mortgage They were allowed in effect to amend their plaint so as to change the relief by asking for a decree against the zamindari share and this was done after the period of limitation to enforce a simple mortgage on that zamindari share had expired. This in our opinion the plaintiffs should not have been permitted to do, and even though the point was not pressed in the lower appellate court, it seems to us that we are bound to take notice of it in second appeal, inasmuch as a question of limitation is involved. In our opinion the amendment of the plaint should not have been allowed and the decree passed for the sale of the zamindari share cannot be sustained We, therefore accept this appeal and setting aside the decrees of both the courts below we dismiss the plaintiff's suit with costs throughout

Appeal allowed.

1914
April, 14

Before Mr Justice Muhammad Rafiq and Mr. Justice Piggott

GOBIND RAO AND OTHERS (JUDGEMENT DEBTORS) v KAMTA PRASAD (DECREE HOLDER)*

Act (Local) No II of 1903 (Bundelkhand Alienation of Land Act), section 9—Mortgage—Suit for foreclosure—Plea, of defendants that they were members of an agricultural tribe—Reference to Collector—Effect of Collector's finding in the negative

In a suit for foreclosure of a mortgage against two sets of defendants, both sets pleaded that they were members of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, applied, and a reference was accordingly made to the Collector under section 9 (3) of that Act The Collector took action under the Act with regard to one set of defendants, but as to the other decided that they were not members of an agricultural tribe *Held* that this finding left the Civil Court no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Alienation of Land Act, 1903

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr *Sundar Lal*, for the respondent

MUHAMMAD RAFIQ and PIGGOTT, JJ —This is a second appeal by certain judgement debtors in an execution case The suit in which the decree in question was passed was a suit for foreclosure on a mortgage by conditional sale, dated the 11th of March, 1877. There was a long array of defendants, but for the purposes of this appeal it is sufficient to say that the first defendant was the heir of the original mortgagor, whereas another set of defendants, who are now appellants before us, were the heirs of one Gopal Rao, who acquired by a transfer subsequent to the mortgage of 1877 a portion of the equity of redemption Before the court in which the suit was instituted the defendants of both these sets pleaded that they were members of an agricultural tribe within the meaning of the Bundelkhand Alienation of Land Act (Local Act II of 1903) The court held that this was a point to be considered after a preliminary decree for foreclosure had been passed, and such a decree was passed on the 26th of January, 1910 When the decree holder applied for a decree absolute, the court recorded an order to the effect that inasmuch as the judgement-

*Execution Second Appeal No 656 of 1913 from a decree of J H Cuming, District Judge of Jhansi, dated the 6th of December, 1912, reversing a decree of Sheo Prasad, Subordinate Judge of Jhansi, dated the 6th of August, 1912

debtors appeared to be members of an agricultural tribe, the case must be referred to the Collector under clause (3) of section 9 of the Bundelkhand Alienation of Land Act As regards the first defendant the heir of the original mortgagor, his case has been dealt with by the Collector under the section above referred to and we are not concerned with it now With respect to those judgement debtors who represented the subsequent transferee, Gopal Rao, the Collector held that they were not members of an agricultural tribe within the meaning of the Act It would seem, however, that a question was raised before the Collector as to whether the decree holder would not accept a mortgage for a term of years, from those judgement debtors also, in lieu of enforcing his strict right to obtain a foreclosure decree The Collector made a note of the terms on which the decree holder was prepared to accept such a mortgage and gave these judgement debtors one week's time within which to execute the same They did not comply with this order, but appealed to the Commissioner against the decision of the Collector that they were not members of an agricultural tribe The Commissioner apparently intended to hold that they were members of an agricultural tribe but based his decision on the finding that, when the judgement debtors appeared before him they professed themselves willing to execute a usufructuary mortgage as directed by the Collector He returned the record to the Collector with directions to "allow a mortgage to be given for twenty years as originally directed" The case having thus come back to the Collector's court, the judgement debtors in question did execute a mortgage, but the decree holder took exception to the terms of that mortgage and refused to accept it The Collector, thereupon, returned the record to the Civil Court without taking any further action which can in any way be regarded as falling under the provisions of section 9 of the Bundelkhand Land Alienation Act The question then arose in the Civil Court whether the decree holder could or could not be given a decree absolute for foreclosure in respect of the share of these judgement debtors in the property originally mortgaged The court of first instance held that no such decree could be passed; but this finding has been reversed by the District Judge on appeal and a decree for foreclosure passed The appeal before us is

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against the decree of the District Judge. We have been through the record and considered the arguments addressed to us. On behalf of the appellants we are asked to consider the question whether they should or should not be held to be members of an agricultural tribe under the Bundelkhand Land Alienation Act and arguments are advanced in favour of the contention that they are so. The real question, however, is as to the effect of the Collector's order returning the record to the Civil Court. Rightly or wrongly the Collector has throughout adhered to the position that these particular judgement debtors were not members of an agricultural tribe. He at no time put the decree holder to the option provided by clause (2) of section 9 of the Act. He has in fact refused to allow these judgement debtors the benefit of the Act. Under these circumstances the District Judge was right, in our opinion, in holding that the Civil Court had no option but to continue the proceedings before it independently of the provisions of the Bundelkhand Land Alienation Act. There was a conditional decree for foreclosure against these judgement debtors and the Collector upon a reference duly made to him has not passed any order which can be regarded as giving the judgement debtors the benefit of the Bundelkhand Land Alienation Act. It follows that a decree absolute for foreclosure must inevitably be passed in respect of the share held by these judgement debtors. We accordingly dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Chamier.

EMPEROR v. GANGA.*

1914
April 24.

Criminal Procedure Code, section 438—Enhancement of sentence—Reference made by District Magistrate after the Sessions Judge has declined to refer—High Court—Practice.

Quaere whether a District Magistrate is as a matter of law entitled to make a reference to the High Court under section 438 of the Code of Criminal Procedure in a matter in which the Sessions Judge has been asked to send a case up to the High Court for enhancement of sentence and has refused to do so. But if he is so entitled it is extremely inconvenient that a District Magistrate should do so and the High Court would not take action upon such a reference

* Criminal Reference No. 240 of 1914.

without special reason *Queen Empress* v *Zor Singh* (1) *Emperor* v *Jamna Bai* (2) and *Emperor* v *Krishnaji Shyam Rao* (3) referred to

IN this case one Ganga Ahir was convicted by the Assistant Sessions Judge of Moradabad of an offence under section 395 of the Indian Penal Code and sentenced to rigorous imprisonment for five years with ninety days solitary confinement The District Magistrate in the first instance sent the record to the Sessions Judge asking that the case might be forwarded to the High Court with a recommendation that the sentence should be enhanced The Sessions Judge declined to send the case to the High Court The District Magistrate accordingly himself submitted the record to the High Court and recommended that the sentence passed upon Ganga should be enhanced

CHAMIER J—This is a reference by the District Magistrate of Moradabad in which he recommends that the sentence of five years' rigorous imprisonment, with ninety days in solitary confinement, passed on Ganga Ahir should be enhanced The case was tried by the Assistant Sessions Judge to whom it was transferred by the Sessions Judge The District Magistrate in the first instance in accordance with the procedure followed in cases tried by Subordinate Magistrates sent the record to the Sessions Judge asking that the case might be forwarded to the High Court with a recommendation that the sentence should be enhanced The Sessions Judge declined to send the case to the High Court The District Magistrate has accordingly submitted the case direct to this Court The question whether this can be done has arisen on several occasions It arose in a case which was in my hands as Government Advocate several years ago This Court while declining to hold that the District Magistrate was not entitled as a matter of law to submit the case to the High Court, observed that the procedure adopted was inconvenient and declined to interfere In the two reported cases *Queen Empress* v *Zor Singh* (1) and *Emperor* v *Jamna Bai* (2) this Court observed that as a general rule it would not entertain a reference from a District Magistrate which had for its object the enhancement of a sentence passed by a Sessions Judge as a court of appeal The remarks made by BANERJI and RICHARDS, JJ in the judgement

(1) (1887) I. L. R 10 All. 146 (2) (190) I L. R. 23 All., 91
(3) (1904) 6 Bom. L. R 1099

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EMPEROR v. GANGA

in the latter case apply equally well to the present case They said "We do not think that the Legislature by using the words 'or otherwise' in section 438 intended to confer upon a Magistrate the power to question the propriety of an order of a Sessions Court and make a reference to this Court upon that ground" The Bombay High Court seems to take the same view in the matter [See *Emperor* v. *Krishnaji Shyam Rao* (1) in which the order passed by the Sessions Judge was an appellate order] I doubt very much whether the District Magistrate is entitled as a matter of law to make this reference but assuming that he is so entitled I think it is extremely inconvenient that a District Magistrate should criticize an order of a court superior to him in this way In the present case it seems that the District Magistrate having failed to induce the Sessions Judge to send the case to this Court asked the Commissioner of the Division to send the case up to the Local Government with a view to having the case brought to the notice of this Court by the Government Advocate, but the Commissioner declined to do so It is quite clear that this Court ought not to interfere in a case of this kind except for special reasons There appear to be no special reasons in the present case All that can be said is that the sentence inflicted is some what lighter than is generally inflicted in a case of this kind In the circumstances I decline to interfere Let the papers be returned

APPELLATE CIVIL

1914 April 28

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

MATHURA PRASAD (PETITIONER) v DURGAWATI AND OTHERS (OPPOSITE PARTIES) *

Act No VII of 1889 (Succession Certificate Act) section 4—Application for certificate—Applicant alleging himself to be joint with the deceased and entitled to his estate by survivorship

Where an applicant for a succession certificate stated in his application that he was a member of a joint Hindu family with the deceased to whose estate he had succeeded by survivorship *Held* that a succession certificate was unnecessary and the application must fail

* First Appeal No. [illegible]03 of 1913 from an order of C W Grant District Judge of Bareilly dated the 28th of August 1913

(1) (1904) 6 Bom. L. R. 10[illegible]0

This was an application for a succession certificate under Act No VII of 1889 The applicant came into court on the allegation that Gaya Prasad, his brother, died joint with him and as the banks in which his money was deposited would not give him the money without the production of a succession certificate he made the present application. He also said that a will had been executed by the deceased, the validity of which however, he disputed. He was not a legatee under the will, though one of his sons was The application was opposed by two of the other three legatees The Judge rejected the application on the ground that as the applicant admitted he was joint with the deceased he could not be given a certificate He also found that the deceased did not die joint with the applicant

Babu *Benode Behari*, for the appellant —

It was a matter of common knowledge that banks insisted on the production of succession certificates There were cases which showed that a surviving member of a joint family need not get a succession certificate, but there was nothing in the Act to prevent his getting one if he wanted

Mr *Sham Nath Mushran* (with him Pandit *Ramakant Malaviya*) for the respondents cited *Pateshuri Partap Narain Singh* v *Bhagwati Prasad* (1) and *Jagmohandas Kilabhai* v *Allu Maria Duskal* (2)

MUHAMMAD RAFIQ and PIGGOTT, JJ —This is an appeal from an order rejecting the application of the appellant for grant of a succession certificate under Act VII of 1889 The appellant in his application to the lower court stated that the deceased Gaya Prasad, in respect of whose estate the certificate was wanted, was his brother and lived with him as a member of a joint undivided Hindu family There were certain other allegations made in the application which need not be referred to The application was opposed and the learned Judge rejected it No evidence was given by either side in the court below in support of the allegations made in the application The learned Judge in rejecting the application said that he thought that the two brothers were separate and that one of the legatees under the will of the deceased was a more likely person to apply for and to be granted a succession

(1) (1895) I L R, 17 All., 578 (2) (1894) I L. R., 19 Bom., 338

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certificate We do not think that there was any evidence before the learned Judge to enable him to come to a decision with regard to the character of the family of the appellant and his deceased brother Gaya Prasad Taking the application as it stands we think that it must fail If the appellant was joint with his brother Gaya Prasad, he, the appellant has succeeded to the estate of the deceased by survivorship, and in such a case, a certificate under Act VII of 1889 is unnecessary The application therefore, fails and the appeal is dismissed with costs

Appeal dismissed

REVISIONAL CRIMINAL

1914
April 15

Before Mr Justice Piggott

BINDHACHAL PRASAD RAI v LAL BIHARI RAI AND OTHERS *

Criminal Procedure Code sections 107 and 250—Frivolous or vexatious complaint—Compensation—Application to Magistrate to bind over certain persons to keep the peace

A person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of section 107 of the Code of Criminal Procedure is not a person accused of any offence Order for payment of compensation cannot therefore be made against a man who has petitioned a Magistrate to take action under section 107 of the Code

ONE Bindhachal Prasad Rai presented a petition to a Magistrate of the first class of the Gorakhpur district praying that action might be taken under section 107 of the Code of Criminal Procedure against the petitioner s brother, Lal Bihari Rai and other persons therein named The Magistrate heard evidence in support of the petition and came to the conclusion that there existed no grounds whatever for his taking action under section 107, and that in fact ' the four accused had been wantonly and maliciously dragged into court by the complainant out of petty spite and in revenge for his own defeat in the case brought against him by Lal Bihari I The Magistrate accordingly, purporting to act under section 250 of the Code, ordered the petitioner to pay Rs 50 as compensation to each of the persons named in the

* Criminal Revision No 198 of 1914 from an order of R. T Booth first class Magistrate of Gorakhpur, dated the 17th of February, 1914

petition Against this order Bindhachal Prasad Rai applied in revision to the High Court 1914

BINDHACHAL PRASAD RAI v LAL BIHARI RAI

Mr *M L Agarwala*, for the applicant

Babu *Benode Behari*, for the opposite parties

PIGGOTT, J —In view of the definition of the word "offence" in the Code of Criminal Procedure it is clear that a person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace, or is otherwise liable to the provisions of section 107 of the Code is not a person accused of any offence An order for payment of compensation cannot be made against a man who has petitioned a Magistrate to take action under section 107 of the Code The objection is one which should have been taken before the Magistrate when the petitioner Bindhachal Prasad was called upon to show cause why the order under section 250 should not be made against him, but the order complained of being in my opinion illegal I cannot allow it to stand now that it has come before me in revision I set aside the order directing Bindhachal Prasad to pay compensation to each of the four persons in respect of whom proceedings under section 107 of the Code were taken The money, if paid will be refunded

Order set aside

PRIVY COUNCIL

SHEO SHANKAR RAM AND OTHERS (PLAINTIFFS) v JADDO KUNWAR (DEFENDANT)

P C 1914 May 11, 12

[On appeal from the High Court of Judicature at Allahabad]

Parties—Parties to suits on mortgages—Hindu joint family—Members of Hindu joint family represented by managing members of the family—Suit by members not made parties to suit to redeem property sold in execution of mortgage executed by managing members—Act No IV of 1882 (Transfer of Property Act) section 85

In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court in *Jaddo Kunwar* v *Sheo Shankar Ram* (1) on the ground that the plaintiffs (appellants) who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit were properly and effectively represented in the suit by the managing members

*Present —Lord MOULTON Lord PARKER of WADDINGTON Sir JOHN EDGE and Mr AMEER ALI

(1) (1910) I L R, 32 All 71

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of the Hindu joint family of which the plaintiffs were also members, and that in such a case the court was not bound to set aside the execution proceedings where substantial justice had been done merely because every existing member of the family was not formally a party to the suit

Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as a whole was bound, and were of opinion that it was clear on the facts of this case, and on the findings of the court upon them, that it was a case where that principle ought to be applied There was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself and no question arose under section 85 of the Transfer of Property Act (IV of 1882), because the mortgagee had no notice of the plaintiff's interests.

APPEAL No 97 of 1912 from a judgement and decree (8th July, 1910) of the High Court at Allahabad, which reversed a judgement and decree (18th December, 1908) of the court of the Subordinate Judge of Ghazipur.

The principal question for determination on this appeal was whether the appellants (plaintiffs) were entitled to redeem the the mortgaged properties in suit under the circumstances of the case

The facts of the case are fully stated in the report of the appeal before the High Court (TUDBALL and CHAMIER, JJ) which will be found in I L R., 33 All, 71.

The Subordinate Judge made a decree in favour of the plaintiffs, and the High Court dismissed the suit

On this appeal—

De Gruyther, K C., and *B Dube* for the appellants contended that they were under section 85 of the Transfer of Property Act (IV of 1882) necessary parties to the foreclosure suits, and the decrees made therein were not binding upon them as they had not been properly represented in those suits The managing members of a Hindu joint family did not necessarily represent all the joint family. "All persons who have an interest" in the property in suit should be joined as parties Could a joint family be treated as a "person'? It was submitted it could not. Order XXXIV, rule 1, of the Code of Civil Procedure (Act No V of 1908) has now been substituted for section 85 of Act No IV of 1882. The fact that the respondent was not aware of the existence of the appellants when she brought her suit should not relieve her from the

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necessity of making them parties until she had proved that after inquiries she had been unable to ascertain who were the other members of the joint family of which she knew Hira Ram and Dhundha Ram were members [Lord MOULTON referred to *Jogendra Deb Roy Kut* v *Funindro Deb Roy Kut* (1)] The latest case before this Board was *Kishan Prasad* v *Har Narain Singh* (2), but that case was distinguishable because there three of the members of a Hindu joint family were with the consent or delegation of the others managers of a business carried on for the benefit of all the members and the suit was one on a contract made in the course of that business In this case the ignorance of the respondent and her omission to make the appellants parties cannot defeat their right if as it was submitted was the case they were not effectively represented in the mortgage suits Members of an ordinary Hindu joint family were not partners and there was no question of a trust, the manager of a joint family not being in the position of a trustee The appellants were entitled to redeem the properties in suit, at any rate to the extent of their respective shares

Sir Erle Richards, K C, and *G R Lowndes* for the first respondent were not called upon

1914, May 12th —The judgement of their Lordships was delivered by Lord MOULTON —

This is an appeal from a judgement and decree of the High Court of Judicature for the North Western Provinces Allahabad, which reversed a decree of the Court of the Subordinate Judge of Ghazipur. The matter in issue is whether the plaintiffs or some of them are entitled to redeem the mortgaged properties in suit, or whether they are bound by certain foreclosure decrees dated the 27th of March 1895, which were followed by orders absolute dated the 3rd of April, 1897, upon which possession was taken in August, 1897

So far as is necessary to make clear the question in issue, the facts of the case are as follows The first and principal respondent Musammat Jaddo Kunwar was the mortgagee of certain properties under a mortgage dated the 16th of September, 1887, and of certain other properties by a mortgage of the 6th

(1) (1871) 14 Moo I. A., 367 (376) (2) (1911) I L. R. 33 All. 272 L. R., 38 I A 45.

occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound It is quite clear from the facts of this case and the findings of the courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arises under section 85 of the Transfer of Property Act, 1882, because the mortgagee had no notice of the plaintiffs' interests Their Lordships have therefore no hesitation in deciding that there is no reason for interfering in the decision of the High Court They will, therefore, humbly advise His Majesty that this appeal should be dismissed and that the appellants should pay the costs

Appeal dismissed.

Solicitor for the appellants — *Douglas Grant.*

Solicitors for the first respondent .—*T. L. Wilson, & Co*

J. V. W.

MISCELLANEOUS CIVIL.

1914
March, 6

Before Mr Justice Tudball and Mr Justice Muhammad Rafiq

RAJ KISHORE DAS (PETITIONER) v JAINT SINGH AND OTHERS (OPPOSITE PARTY) *

Lease—Unexpired term of lease bequeathed to widow—Widow holding over on expiry of lease—Grant by Government to widow of property the subject of the lease—Nature of estate taken by widow

A lease of a village in Kumaun was granted by the Government in 1844 for a period of twenty years The lessee died in 1852 having left his interest in the village (without clearly specifying what it amounted to) to his widow for life and after her to her daughter for life with a reversion in favour of a certain temple The widow, however, continued in possession of the village down to 1871, when the Government granted her a proprietary interest in it, which she subsequently sold

Held on suit for possession after the death of the widow and her daughter by a person claiming as reversioner to the original lessee, that the estate which the widow acquired in 1871 as the grantee of the Government was her own personal estate and not merely an enlargement of the leasehold estate of her husband, and that the plaintiff had consequently no right to succeed

* Civil Miscellaneous No 129 of 1913

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RAJ KISHORE DAS
v.
SAINT SINGH.

THIS was a reference by the Local Government under rule 17 of the rules and orders relating to the Kumaun Division, 1894. The facts out of which it arose were as follows:—

In 1844 a settlement of certain tracts of jungle and waste land in the district of Kumaun was made with one Tula Ram Sah for the period of 20 years at an assessment of Rs. 3 a year, by means of a farming or *mustajiri* lease granted by the Government to him. In 1851, Tula Ram Sah made a will by which he bequeathed the whole of his property to his wife, Musammat Ratni, for her life, and after her death to his daughter for her life, and the reversion to the temple of Sri Jagannathji. Tula Ram died in 1852, and after his death Musammat Ratni obtained possession of his property including the said tracts of land. Her possession over these lands continued up to 1871. In that year the Government made a grant to her of full proprietary rights thereto. Soon after the grant Musammat Ratni sold these lands to the defendants or their predecessors in interest.

After the death of Musammat Ratni and that of her daughter the manager and trustee of the temple of Sri Jagannathji sued as reversionary legatee of the will of Tula Ram, for recovery of possession of these lands from the defendants. He contended that Musammat Ratni could not pass to the defendants anything more than her life interest which she had derived under her husband's will. The defendants pleaded that Musammat Ratni was a full owner when she sold the property to them and passed to them rights of full ownership. They also raised other pleas, one of them being that if the plaintiff was entitled to possession he should first pay them compensation for the improvements made by them to the estate. The Deputy Commissioner dismissed the suit on the ground that Musammat Ratni was the absolute owner of the property at the date of the sale by her to the defendants. This decision was upheld by the Commissioner on appeal. The plaintiff petitioned the Local Government, who referred the case to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the applicant (plaintiff):—

The exact terms of the lease granted to Tula Ram are not available; but a reference to the settlement records and other publications shows that the lease was a sort of farming lease

(mustajiri) carrying with it an understanding that if the Government was satisfied with the efforts of the lessee to improve the land proprietary rights would be bestowed on him or on his heirs This was the settled and declared policy of the Government, and in accordance with it proprietary rights were conferred on the *mustajirs* at the settlement of 1871, so that there were no *mustajirs* left after that settlement.

Thus the nucleus of the proprietary rights was already with Tula Ram which would ripen in time to full rights of ownership As legatee under his will his widow obtained a life interest in his rights for the residue of the term of the lease with the probability that those rights would ripen into full ownership, and when they did so ripen she continued to hold the enlarged estate for her life with reversion to the other legatees The enlargement of the estate would enure for the benefit of the estate and not for her own personal benefit. Her estate would continue to be a life estate merely and she could not confer anything more upon the defendants, *Kashi Prasad* v *Inda Kunwar* (1) *Sirvya* Hindu Woman's Estate page 113 Cases of confiscation and subsequent re grant of the former estate by the Government are analogous for example the case of *Baboo Beer Pertab Sahee* v *Maharajah Rajender Pertab Sahee* (2) The principle of the following cases is also applicable *Pingala Lakshmipathi* v *Bommireddipalli Chalamayya* (3) and *Subbaroya Chetty* v *Aiyaswami Aiyar* (4)

If the Government had granted to Musammat Ratni some other property she might then become full owner in her own individual right The grant was made of the same land and it was made to her in and by virtue of her capacity as the heir of the *mustajir* Tula Ram The grant was made in accordance with the policy of the Government to confer the full estate upon those who already held the limited interest

Dr *Satish Chandra Banerji* for the opposite party (defendants) —

Tula Ram was only a *mustajir* he had no proprietary rights The Government might or might not choose to confer such rights on him afterwards It has not been shown that there was any

(1) (1908) I. L. R. 30 All. 490
(2) (1867) 12 Moo. I. A. 1 (34)
(3) (1907) I. L. R., 30 Mad., 434
(4) (1908) I. L. R. 32 Mad., 86

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guarantee, or that it was an invariable practice to confer full rights upon *mustajirs* A reference to Government records and Board circulars shows that *mustajiri* rights would cease at once on the determination of the term of the *mustajiri*, and that they were not transferable No nucleus of proprietary rights had vested in Tula Ram Thus Tula Ram had no interest in the land which he could devise by will The plaintiff has derived no title under the will and Tula Ram not having any devisable interest in the property Musammat Ratni s possession was from the outset in her own individual capacity and not in the capacity of legatee of Tula Ram s estate Even if Tula Ram could devise or transfer the unexpired remainder of the farming lease the rights of the transferee or legatee would terminate on the expiry of the term of the lease in 1864 In that year the operation of the will came to an end After that year Musammat Ratni s possession could in no way be deemed to be that of a legatee of her husband s estate Since 1864 at all events her possession was in her own personal right and capacity and it was in that right and capacity that she acquired full proprietary rights in 1871 She was therefore competent to transfer absolute rights of ownership to the defendants If the legatee continues in possession after the term of the original grant has expired and then acquires full rights he cannot be said to have acquired the property in his capacity of legatee If during the continuance of the original lease the legatee acquires full rights then the matter is different and the doctrine of graft applies , *Keech* v *Sandford* (1) Where the original estate is not extant there can be no engrafting It has been held that if the tenant holds over, the term of the original lease is not thereby extended The fact that Musammat Ratni was holding over after expiry of the term of the lease in 1864 could not extend the lease beyond 1864 The rulings cited by the applicant are not applicable to the facts of this case I rely on the analogy of the case of *Brij Indar Bahadur* v *Ranee Janki Koer* (2)

The Hon ble Dr *Sundar Lal*, in reply —

The holding over for a shorter term is in effect a renewal of the original lease for that term. It is by reason of the person

(1) (1726) 2 W and T 7th Ed p 693 (2) (1877) L R 5 I A , 1

being the former tenant that the law implies a renewal of the lease A stranger would not be treated in this way In effect the term of the original *mustajiri* was being extended from year to year since 1864 until the Settlement of 1871 She was holding as a *mustajir* and it was in that capacity that proprietary rights were granted to her So the doctrine of graft applies

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RAJ KISHORE DAS v. JAINT SING

TUDBALL and MUHAMMAD RAFIQ JJ —This is a reference under rule 17 of the rules and orders relating to the Kumaun division The facts of the case out of which the reference has arisen are as follows In the year 1844 one Tula Ram Sah was a Government treasurer at Almora The village of mauza Nagar together with its appurtenant hamlets called Bajera &c was lying waste At the settlement of that year a farming lease of the same was offered to Tula Ram for a period of twenty years on payment of a sum of Rs 3 per annum Tula Ram appears to have been very unwilling to accept this generous offer of the Government The completion of the matter was delayed for about two years until in 1846 he was finally forced to accept a *patta* and to execute an agreement In 1851 he executed a will under which he left the whole of his estate without specification of its details to his wife for her life and on her death to her daughter Musammat Gangotri for her life with reversion to the temple of Jagannath the trustee of which is the plaintiff in the present suit Tula Ram died in 1852 His widow Musammat Ratni sold all her right title and interest in the above named village to the predecessor in title of the present defendants They have been in possession since then ostensibly as owners Prior to their purchase the vendees appear to have been *khaikars* or a class of occupancy tenants in possession of cultivated lands Musammat Ratni died but her daughter Musammat Gangotri remained alive till 1904 The present suit was brought soon after her death by the trustee of the temple of Jagannath to recover possession from the defendants on the ground that the estate of Musammat Ratni was only one for her life and that the two life estates having now vanished the plaintiff as remainderman under the will was entitled to the property and that Musammat Ratni had no power to transfer more than her life interest under the will The defendants met the case by pleading that Musammat Ratni on the date of the sale was the absolute

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owner of the property and had power to transfer to them full right of ownership There was a further plea that even if the plaintiff was entitled to the estate still section 51 of the Transfer of Property Act applied in respect to those improvements which had been made by the defendants and the plaintiff would not be entitled to possession unless and until he made good to the defendants the expenditure incurred by the latter on the said improvements It was also pleaded that the defendants were persons who had a right at the date of the sale to occupy and cultivate the said lands and even if absolute title did not pass to them they have not lost that right and still are entitled to retain actual physical possession as *khaikars* The suit was dismissed by the District Judge who held that Musammat Ratni was at the date of the sale an absolute owner of the property He held that section 51 of the Transfer of Property Act would apply even if the widow had only a life interest He also held that the plaintiff's claim to possession was barred by the re emergence of the previous occupancy rights of the defendants This decision was upheld by the Commissioner on appeal and the Local Government have referred to us seven points for an expression of our opinion

The first question and the most important is was Musammat Ratni s title previous to 1871 based on the will of her husband or on mere possession It should be noticed in the beginning that the will of Tula Ram Sah makes no special mention of his estate in the village now in suit His exact right in this village is not absolutely clear There can be no doubt from the settlement record of 1844 that a lease was granted to him, but no copy of this lease is forthcoming It is not to be found on the settlement record and his agreement dated the 8th of August 1846 does not set out the terms and conditions on which the lease had been granted to him It is clear that the lease was for a fixed period which came to an end in 1864 Whether his rights as a lessee were transferable or not is by no means clear A reference to the selections of the records of the Government of the North Western Provinces known as Mr Thomason s Despatch volume II at pages 202 203 and 204 specially to paragraph 9 on page 204 goes to show that a farming tenure such as was granted to Tula Ram was not transferable It shows clearly that such a

lease however terminated on the expiry of the period for which it was granted On behalf of the defendants it is urged that when Tula Ram died in 1852 the lease came to an end and if his widow Musammat Ratni continued to hold the property she could not possibly have held *qua* legatee under the will, but only in her own personal right It is further urged that even supposing that the lease continued to run for its full period and that she held the property during that period *qua* legatee under the will, still the leasehold came to an end in 1864, that is some seven years before 1871, the date of the transfer, and that when she continued to hold from 1864 to 1871 she held in her own right either as a lessee direct from the Government or as a trespasser In the year 1871 the Government bestowed on her full proprietary title in the estate in dispute On behalf of the defendants it is urged that this is an acquisition of her own and that she had therefore full power to transfer it by a deed of sale On behalf of the plaintiff it is urged, however that Musammat Ratni, from the date of her husband's death up to the year 1871, was holding this estate as a legatee under the will having therein only a life estate, that while she held in this capacity the estate was enlarged, and that the enlargement is one which enured to the benefit of the estate and as such must pass over to the remainderman. The decision of the point depends on the capacity in which Musammat Ratni was holding the village now in dispute in 1871, at the time when the Government in pursuance of a general policy of not retaining proprietary possession in its own hands bestowed proprietary title on many persons, some of whose claims thereto were vague and some who as farmers had no claim at all As we have pointed out above, it is by no means clear on what terms this property was leased to Tula Ram It seems highly probable that the rights of a lessee were not transferable But it is impossible to come to a definite finding in the absence of clear evidence on the point It is, however, quite clear that the term of the lease came to an end in 1864, and it was then in the option of the Government to grant a fresh lease to anybody to whom it might think fit to grant it As a matter of fact it allowed Musammat Ratni to continue in possession, and in the year 1871, finding her to be a person who had apparently brought the village under cultivation and settled tenants on it, and therefore a

1911

EMPEROR v GAYA PRASAD

Mr C Dillon Mr C Ross Alston, Babu Satya Chandra Mukerji and Babu Sital Prasad Ghosh for the appellants

(The Government Advocate) Mr A E Ryves for the Crown

MUHAMMAD RAFIQ and PIGGOTT, JJ —In this case Gaya Prasad *Brahmin* Chadammi Lal *Mallah*, Raja Ram *Brahmin* and Nanhe *Bhat* were tried before the Sessions Judge of Cawnpore on a charge under section 302 Indian Penal Code, in respect of the murder of a woman named Musammat Janki Kunwar and a boy eleven or twelve years of age named Durga They have been found guilty and sentenced to death The Sessions Judge has also under section 62 Indian Penal Code passed an order of forfeiture in respect of all the property of the accused Chadammi Lal The record is before us for confirmation of the sentences of death and the four accused have all appealed The case has been fully and ably argued on their behalf The evidence on the record is voluminous and the learned Sessions Judge has written a careful and elaborate judgement In dealing with the matter we may consider first of all the antecedent circumstances of the parties concerned and the evidence of motive Musammat Janki Kunwar married successively two brothers named Kesho and Manna who were the sons of one Umrai This Umrai was the son of one Subba Lal and the accused Chadammi Lal is a great grandson of the aforesaid Subba Lal The evidence on the record shows that Kesho and Manna were co sharers in certain landed property and also that in consequence of certain successful litigation a sum of Rs 7 000 payable to Kesho and Manna in equal shares was realized and deposited in the court of the Subordinate Judge of Cawnpore From the time of Kesho s death there was ill feeling and litigation btween his widow Musammat Janki Kunwar and the other branch of the family which was represented in the first instance by one Lachman another great-grandson of Subba Lal by a different line Since the death of this Lachman the accused Chadammi Lal has acted as the head of this branch of the family The result so far may be summed up as follows —Kesho s share in the zamindari property seems to have been lost to Musammat Janki Kunwar altogether Manna s share was in the possession of Chadammi Lal although Manna s name continued to be recorded as proprietor Of the money deposited in court however Musammat

Janki Kunwar succeeded in securing half (Rs 3,500) as representing the share of her first husband Kesho Lachman seems to have made an attempt, several years ago, to secure the other half by getting himself appointed guardian of the person and property of Manna who was then a little under eighteen years of age This attempt was defeated by Manna's appearance in court, but shortly after this, and before he could himself take steps to secure the money Manna disappeared The witness Pukhai who is Musammat Janki Kunwar's uncle and whose evidence contains most of the facts regarding the previous history of the family, seems convinced that Manna was in fact murdered by, or at the instigation of, Lachman or Chadammi Lal At any rate Musammat Janki Kunwar's attempt to recover the remaining Rs 3 500 was defeated by an order of the court that the money would continue in deposit until Manna s death could be proved, or could legally be presumed by reason of his unexplained absence for a period of seven years This period was drawing to a close at the end of the calendar year 1913 The evidence of Pukhai shows that towards the close of the year advances were made to Musammat Janki Kunwar on behalf of the accused Chadammi Lal The accused Gaya Prasad who is the patwari of the village of Karhwa, in which some of the family property is situated, also came forward in the matter apparently as a friend of both parties We think there is good evidence that this man was trusted by Musammat Janki Kunwar and had been of service to her in defeating a previous attempt to get Manna s name removed from the village papers The position therefore was that as soon as Manna's death could legally be presumed, Musammat Janki Kunwar might be expected to move in the matter of recovering the 3,500 rupees lying in deposit in court and Chadammi Lal might be expected to move in the matter of getting Manna's name removed from the village papers and his own possession formally recognized There was therefore clear ground for discussion and compromise, and at the same time it is idle for the defence to contend that Chadammi Lal had not a strong motive for putting Musammat Janki Kunwar out of his way As regards the accused Gaya Prasad the case for the prosecution is that he had been won over by a gift of land by Chadammi Lal He has offered an explanation

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of this matter in his defence, but we are not prepared to say that we find it proved. The other two accused, Raja Ram and Nanhe, are merely the servants of Chadammi Lal's.

[The judgement then discussed the evidence in the case and the contentions raised on behalf of the appellants and concluded as follows]

Taking into account Nanhe's confession, along with the evidence on the record, in our opinion the learned Sessions Judge has rightly convicted the four appellants of the offence charged. The murder had been carefully premeditated and was a singularly brutal one We are not prepared to interfere with the sentence, except as regards the order of forfeiture of Chadammi Lal's property passed under section 62 of the Indian Penal Code. It seems to us that that section should ordinarily be applied in cases of crimes against the State or affecting the safety of the public generally. Moreover, to confirm this order of forfeiture would be to punish the innocent members of Chadammi's family. We set aside this portion of the order. For the rest, we dismiss the appeals of Gaya Prasad, Chadammi Lal, Raja Ram and Nanhe and confirming their conviction and sentences direct that the latter be carried out according to law.

Appeal allowed in part.

1914
April, 8

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

SHEO GOPAL AND ANOTHER (JUDGEMENT DEBTORS) v NAJIB KHAN (DECREE HOLDER)*

Pre emption—Execution of decree—Decretal amount deposited, but part taken out of court by a creditor of the decree-holder, the decree for pre-emption having been set aside—Restoration of decree on appeal—Position of decree holder.

A decree for pre-emption conditional on the plaintiff pre-emptor [illegible]
in court by a certain date Rs [illegible]
the vendee the decree was se[illegible]
deposited by the pre-emptor was attached and drawn out of court by a creditor who had obtained a money decree against him The decree was, however, restored as the result of an appeal to the High Court *Held* that the plaintiff was entitled to execute his decree upon making good the amount which had

* Appeal No 84 of 1913, under section 10 of the Letters Patent.

been removed by his creditor *Held also that the court of first instance ought* not to have permitted any part of the money deposited to be withdrawn until the pre-emption suit had been finally decided *Abdus Salam v Wilayat Ali* (1) distinguished

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THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court The facts of the case are fully set forth in the judgement under appeal, which was as follows —

"The facts of the case are as follows. The decree holder, who is the appellant before me, brought a suit for pre-emption of certain property, and on the 13th of February, 1907, he obtained a decree for possession conditional on his paying into court to the credit of the vendee the sum of Rs 1,000 on or before the 15th of March, 1907 On the 6th of March, 1907, he deposited the money in court On the 15th of March, 1907, the vendee appealed The money remained in court On the 15th of June 1907, the appeal was allowed and the decree was set aside On the 18th of July, 1907, one Daryao Singh, who had obtained a money decree against the pre-emptor, attached a portion of the money in execution of his decree The pre emptor objected to the attachment and did his best to protect the money But the court decided against him and Daryao Singh removed the sum of Rs 193-4 6 In the meantime on the 13th of November, 1907, the pre emptor filed a second appeal in the High Court, and on the 14th of July 1908, that appeal was allowed and the case was remanded to the court of first appeal for decision on its merits This decision was upheld on Letters Patent appeal on the 26th of February, 1909 The District Judge then decided the appeal on its merits on the 27th of August, 1909, and dismissed the appeal upholding the decision of the court of first instance The decree-holder then applied to the court of first instance to be put in possession of the property in execution of the decree Objection was taken on behalf of the vendee that the full sum of Rs 1,000 was not in court and available to him, and that therefore the decree holder should not be granted possession The court of first instance dismissed the objection and granted possession to the decree-holder. The latter was put into possession The vendee appealed to the District Judge The District Judge has passed an order that if the pre emptor do pay into court within a fixed time the sum of Rs 193 4 6 plus a further sum of Rs 100 as damages to the vendee, then order of the first court shall stand good and possession will remain with the pre emptor but if the aforesaid amount is not paid into court to the credit of the vendee within the time fixed, then the order of the court of first instance should be set aside and the vendee be restored to possession and the balance of Rs 1 000 will be repayable to the pre emptor. The pre emptor decree holder has appealed The vendee has filed certain objections, one of which has clearly been made on a misunderstanding of the order of the District Judge The vendee appears to have been under the apprehension that the District Judge ordered payment of the sum of Rs 100 only, whereas as a matter of fact the District Judge ordered payment of Rs 293-4-6. The other objection, however, is to the effect that in the circumstances the application for

(1) Weekly Notes 1897, p 31

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execution by delivery of possession should have been disallowed *in toto* The case for the appellant is that he is entitled to possession of the property free of all conditions It is quite clear that the present trouble has arisen solely by reason of the appeal which the defendant vendee made on the 15th of March, 1907, to the District Judge The final decree in the case is the decree of the 27th of August, 1909, whereby the decree of the 13th of February, 1907, was upheld This latter decree laid down a certain condition, and nobody can deny that that condition was properly fulfilled by the plaintiff pre emptor It is urged that after the appeal was allowed on the 15th of June, 1907, the money was no longer pre emption money, that it was money belonging to the pre emptor personally and his judgement creditor Daryao Singh had every right to attach it But the whole matter was really *sub judice* The pre-emptor cannot be said to be guilty of any negligence whatsoever When the money was attached he did his best to protect it It was lying in court at the peril of that person to whom as between the parties the court would finally decide that that sum was payable That final decision was that it was payable to the vendee and therefore it was in my opinion clear that the money lay in court at the peril of the vendee The situation was brought about wholly and solely by his appeal, which finally failed It is impossible to hold that the action of Daryao Singh can be held to be the action of the pre-emptor His removing of the money from court cannot in any wise be said to be a removal by the pre emptor The vendee chose to take his chance of an appeal, and the appeal was finally decided against him The money was lying to his credit in court, and I can see no wrongful act on the part of the pre emptor to which the loss of the sum of Rs 193 4 6 can be ascribed It is true that it is his duty to pay his creditor There is nothing to show that he had no other property wherefrom to pay the small debt of Rs 193 4 6 In the circumstances of the case, I can see no equity in forcing the pre emptor to pay a further sum of Rs 193 4 6 much less the additional fine of Rs 100 which has been imposed by the District Judge The order for payment of this latter sum seems to me to be based on no principle whatever The decree holder having fully carried out the condition entered in the decree and not having removed any portion of that sum wrongfully from the court is entitled to be placed in possession of the property without any restriction whatsoever I allow the appeal set aside the decree of the lower appellate court and restore that of the court of first instance The objections filed by the respondent are disallowed The appellant will have his costs in all courts"

Mr. *M. L Agarwala,* for the appellant —

The vendee is entitled to receive the whole of the Rs 1,000 He cannot be compelled to part with the property for any less sum. It was due to no fault of his that a portion of the money in deposit was paid out to a creditor of the pre emptor At the time when the sum of Rs 193 4 6 was attached and paid out there was no pre-emption decree extant; the amount deposited was not, at that time, at the disposal of the vendee but of the pre emptor. The

money was not then lying at the vendee s risk The pre emptor was benefited by the payment of the sum of Rs 193 4 6 as it went to satisfy a judgement debt of his Equity requires that he should make good the deficiency to the vendee, otherwise he would be deriving the benefit of the same sum twice The decree has not been complied with, as the whole of the sum of Rs 1 000 is not available to the vendee

Babu *Binoy Kumar Mukerji* for the respondent —

The pre emptor fully complied with the decree by depositing the full amount within the time fixed, to the credit of the vendee Nothing more was required to be done by the decree The court executing the decree cannot go behind it and order any further sum to be paid now An executing court cannot vary the decree The decree did not say that the money was not only to be duly deposited but thereafter safeguarded by the pre emptor till it pleased the vendee to take it The money was deposited to the credit of the vendee and if anything happened to it while in the custody of the court and through no fault of the pre emptor the vendee must suffer the loss resulting from his negligence in not taking the money out of court The court acted wrongly in allowing a portion of the money to be attached and taken out by a third person before a final decree had been made in the suit The pre emptor protested against the attachment and did his best to safeguard the interests of the vendee He should not be punished for a fault not his own I rely on the case of *Abdus Salam* v *Wilayat Ali Khan* (1)

RICHARDS C J and BANERJI, J —This is a judgement-debtor s appeal The facts are very fully stated in the judgement of the learned Judge of this Court dated the 6th of June, 1913 It appears that on the 15th of February 1907, Najib Khan obtained a decree in a pre emption suit, conditional upon his paying into court the sum of Rs 1 000 by the 15th of March 1907 He complied with this condition The vendee however appealed, and on his appeal the claim was dismissed on the 15th of June, 1907 On the 18th of July of the same year a creditor of Najib Khan attached the Rs 1 000 which was deposited in court for the payment of the decree which he had against Najib Khan for Rs 193-4 6 and this

(1) Weekly Notes 1897, p 31.

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sum was paid to the creditor Eventually, however, the High Court remanded the case to the lower appellate court and that court affirmed the decree of the court of first instance that is to say, the decree for pre emption The plaintiff Najib Khan, the decree holder, after the lapse of some time applied in execution for possession He was met by the plea that the one thousand rupees was not in court for payment to the vendee The court executing the decree, thereupon, allowed the application The vendee appealed and the lower appellate court modified the order of the court of first instance by directing that if Najib Khan paid Rs 193 4 6, together with Rs 100 damages, then he might have possession but not otherwise On second appeal to this Court a learned Judge allowed the appeal and restored the order of the court of first instance

In our opinion the equity of the case is clearly in favour of the vendee being paid the full amount of the consideration for his sale which was set aside as the result of the decree in the pre-emption suit It was no fault of his that the money was paid out of court to the creditor of Najib Khan Najib Khan clearly benefited by the payment because the debt to one of his creditors was satisfied Of course it was quite wrong of the court which granted the attachment of the money in court to order its payment out until a final decree had been made in the pre emption suit The learned Judge of this Court says — 'In the circumstances of the case I can see no equity in enforcing the pre emptor to pay a further sum of Rs 193 4 6, much less the additional fine of Rs 100, which has been imposed by the District Judge' While we agree with our learned colleague about the fine of Rs 100, we cannot agree with him in what he says about the Rs 193 4 6 In the first place it is not paying any "further sum" *to the vendee* The vendee never received the Rs 193 4 6, and in the next place whatever misfortune Najib Khan may have suffered as the result of the order for payment out to the attaching creditor the vendee has the clearest equity to be paid back the money which he paid for the property to his vendor, which property he is now being dispossessed of As already mentioned, the Rs 193 4 6, went to discharge a debt of Najib Khan The

case of *Abdus Salam* v. *Wilayat Ali Khan* (1) has been cited. It is unnecessary for us to express any opinion upon this case It is clearly distinguishable from the present because at the date when the money in that case was attached and paid out the pre-emption decree stood good and the money was payable to the vendee. In the present case, when the money was paid over the decree of the court of first instance had been set aside by the District Judge, and the money, if it belonged to any one, belonged to the pre-emptor. We allow the appeal to this extent that we vary the decree both of this court and of the lower appellate court by directing that the plaintiff Najib Khan shall have possession upon the terms of his paying into court the sum of Rs. 193-4 6, within two months from this date. We direct that the appellants do have their costs of both hearings in this Court. In the court below each party will bear his own costs.

Decree modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott

1914 April, 15.

AHSAN-ULLAH KHAN *v.* MANSUKH RAM *

Criminal Procedure Code, sections 195 and 439—Sanction to prosecute—Revision—Powers of High Court.

Section 195 of the Code of Criminal Procedure does not enable the High Court to reconsider an order of a Sessions Judge, refusing under clause (6) to grant a sanction to prosecute which was refused by the Magistrate, and although the revisional jurisdiction of the High Court under section 439 of the Code of Criminal Procedure can always be exercised in order to prevent a grosss and palpable failure of justice, it should not be exercised in such a way as to practically give a right of appeal in cases where such right is definitely excluded by the Code

IN this case one Mansukh Ram brought a criminal charge against Ahsan-ullah Khan, and others alleging the commission by them of offences punishable under sections 427 and 147 of the Indian Penal Code. The accused persons were acquitted. Thereafter Ahsan-ullah Khan applied to the trying Magistrate for sanction to prosecute Mansukh Ram, and his principal

* Criminal Revision No. 175 of 1914, from an order of L. Johnston, Sessions Judge of Meerut, dated the 7th of November, 1913

(1) Weekly Notes, 1897, p. 31

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witnesses for the offence of giving false evidence punishable under section 193 of the Indian Penal Code The Magistrate for reasons stated by him in his order granted sanction in respect of Mansukh Ram but rejected the applications in respect of the witnesses and on a further application under section 195 of the Code of Criminal Procedure this order was upheld by the Sessions Judge Ahsan ullah Khan thereupon applied in revision to the High Court

Mr *G P Boys* for the applicant

Mr *R K Sorabji* for the opposite party

PIGGOTT J —I have before me a series of connected applications by one Ahsan ullah Khan arising out of the following circumstances Mansukh Ram brought a criminal charge against Ahsan ullah Khan and others alleging the commission by them of offences punishable under sections 427 and 147 of the Indian Penal Code After a very careful trial the accused persons were acquitted Some two months after the order of acquittal Ahsan ullah Khan presented to the court of the trying magistrate a series of applications asking for sanction to prosecute Mansukh Ram and his principal witnesses for the offence of giving false evidence punishable under section 193 of the Indian Penal Code In connection with the said prosecution the magistrate found that one of Mansukh Ram s witnesses had made a statement in support of which he produced a certain document and that an examination of that document affords strong reasons for supposing that the statement made by him was false He sanctioned the prosecution of that witness He rejected the remaining applications in an order the substance of which I understand to be that there was no reason to believe that the offences alleged by Mansukh Ram had in fact been committed, that his judgement of acquittal could not be considered as amounting to more than this, that Mansukh Ram *had failed to prove by convincing evidence that these offences had* been committed by Ahsan ullah Khan and others, that in his opinion a conviction upon the materials available when once Mansukh Ram and his fellow witnesses were placed in the dock instead of the witness box, was decidedly improbable and that finally the case as a whole seemed to him to be one in which a court should either have taken action of its own motion under section 476 of the

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Code of Criminal Procedure or should decline to take any action at all. Ahsan ullah took this order, as he was perfectly entitled to do, before the Sessions Judge under clause (6) of section 195 of the Code of Criminal Procedure The Sessions Judge in a brief order has expressed a general concurrence with the view of the magistrate I take it to be settled law that nothing in section 195 of the Code of Criminal Procedure itself justifies this Court in reconsidering the order of the Sessions Judge The question is whether the case is one in which this Court after examining all the records in question should in its discretion exercise powers conferred on it by section 439 of the Code of Criminal Procedure The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure I called for the record of this case and issued notice to Mansukh Ram and the other accused persons in order to satisfy myself whether the case was one in which it could be said that the orders of courts below had proceeded upon clearly erroneous principles of law, or were likely to result in obvious failure of justice I have now fully considered the whole question in the light more particularly of the elaborate judgement written by the trying magistrate when he acquitted Ahsan ullah Khan and the persons accused along with him I think it sufficient to say that having done this, I do not regard the present case as a suitable one for the exercise of the revisional jurisdiction of this Court The applications will stand dismissed and the records will be returned

Application dismissed

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April 28.

APPELLATE CIVIL

Before Mr. Justice Tudball and Mr. Justice Chamier

BAL KRISHNA DAS (PLAINTIFF) *v.* HIRA LAL BAGLA AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order I, rule 3—Parties—Misjoinder—Suit by reversioner for possession—Other reversioners and transferees from widow joined as defendants.

Held that it was competent to a reversioner suing for possession of immovable property after the death of a Hindu widow to join as defendants both other reversioners in possession of the property claimed and also transferees of such property from the widow, and the suit was not bad for multifariousness. *Parbati Kunwar* v. *Mahmud Fatima* (1) *Kubra Jan* v. *Ram Bali* (2) and *Ganesh Lal* v. *Khairati Singh* (3) referred to.

THIS was a suit for possession of immovable property brought by a reversioner after the death of a Hindu widow and her daughter. Several defendants were impleaded in the suit, of whom one was admittedly entitled to a portion of the property as a reversioner whilst others were transferees from the lady who was last in possession. There were various defences, among them being the plea that the suit was bad for multifariousness. During the pendency of the suit the plaintiff and defendants 1 and 2 came to terms. Under the compromise a house which was transferred to defendants 3 and 4 and certain property which was mortgaged to defendant 5 were to go to the plaintiff and the rest of the property was to go to defendant 2. On the basis of this compromise the court below gave the plaintiff a decree as against defendants 1 and 2, but it held that the suit was bad for multifariousness, and it called upon the plaintiff to elect as to the portion of his suit with which he would proceed. The plaintiff declined to elect and so the court below dismissed the suit with costs.

The plaintiff appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *S. J. Shapoorji*, Babu *Jogindro Nath Chaudhri*, Babu *Harendra Krishna Mukerji*, The Hon'ble Dr. *Tej Bahadur*

*First Appeal No. 320 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 10th of July, 1912.

(1) (1907) I. L. R., 29 All., 207. (2) (1908) I. L. R., 30 All., 560.
(3) (1894) I. L. R., 16 All., 279.

Sapru and Babu *Amulya Charan Mitra*, for the respondents

TUDBALL and CHAMIER, J J —This is a plaintiff's appeal arising out of a suit for possession of property The plaintiff's case was that one Ram Jas died leaving an estate and a widow, Musammat Hira Dei The latter died and was succeeded by his daughter Musammat Lakhi Bibi, who died on the 23rd of April, 1906 Musammat Lakhi Bibi transferred certain portions of the estate The plaintiff claims as a *bandhu* a one third share of the estate, admitting that defendant No 2 is entitled to two thirds He impleaded defendants 1 and 2 as being in possession of some of the property, defendants 3 and 4 as transferees of a certain house in Calcutta from Musammat Lakhi Bibi, and defendant 5 as a mortgagee of another portion of the estate from the same lady These transfers he alleges to be null and void as against his interest There were various defences among them being the plea that the suit was bad for multifariousness During the pendency of the suit the plaintiff and defendants 1 and 2 came to terms Under the compromise that house which was transferred to defendants 3 and 4 and the property which was mortgaged to defendant 5 were to go to the plaintiff and the rest of the property was to go to defendant 2. On the basis of this compromise the court below gave the plaintiff a decree as against defendant 1 and 2, but it held that the suit was bad for multifariousness and it called upon the plaintiff to elect as to the portion of his suit with which he would proceed. The plaintiff declined to elect, and so the court below dismissed the suit with costs We may also note that after the compromise with defendants 1 and 2 the plaintiff sought to amend his plaint so as to enable him to recover the whole of the property transferred to defendants 3, 4 and 5 The plaintiff has come here on appeal. It is urged that the decision of the court below is incorrect, especially in view of rule 3, order I, and the decisions in *Parbati Kunwar* v *Mahmud Fatima* (1) and *Kubra Jan* v. *Ram Bali* (2) On behalf of the respondents it is urged that the case is similar in all its aspects to the decision in *Ganeshi Lal* v. *Khairati Singh* (3) We are clearly of opinion that,

(1) (1907) I. L. R., 29 All., 67 (2) (1908) I. L. R., 30 All., 560
(3) (1894) I. L. R. 16 All., 279.

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whatever may have been the correct view of the law as it was prior to the present Code of Civil Procedure the point is covered by the clear language of order I, rule 3 Under that order it is clear that the plaintiff's suit was not bad for multifariousness and he was entitled to join all the defendants as parties to the suit so as to enable him to recover his share in the whole of the estate of Ram Jas In this view the appeal must succeed We allow the appeal, set aside the decree of the court below and remand the case to that court for decision according to law The plaintiff will be allowed to amend his plaint as desired. The costs of this appeal will be costs in the cause and will abide the result

Appeal allowed.

1914
April 29

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

BALESHAR AND ANOTHER (DEFENDANTS) v RAM DEO (PLAINTIFF) AND BANARAJ AND OTHERS (DEFENDANTS)*

Act No XV of 1877 (Indian Limitation Act), section 19—Acknowledgment—Suit for redemption—Admission in plaint that a certain person had a right to redeem as a co mortgagor

Where in a suit for redemption of a mortgage the plaintiffs, who were purchasers of a portion of the mortgaged property, admitted in their plaint the right of a representative of one of the original mortgagors to redeem, it was *held* that this was a good acknowledgment within the meaning of section 19 of the Indian Limitation Act, 1877, and enured in favour of the representatives of the person so mentioned *Sukhamoni Chowdhrani* v *Ishan Chunder Roy* (1) referred to

THE material facts of this case were as follows —

Mohan Singh, Naunid Singh and Zahar Singh were three brothers Mohan Singh as managing member of the family mortgaged a 5 anna 4 pie zamindari share in four villages to one Ishri Singh for Rs 601, on the 25th of July, 1823, and put the mortgagees in possession Mohan Singh had two sons, *viz*, Manni Singh and Naipal Singh Manni Singh and the descendants of the other two brothers of Mohan Singh sold their equity of redemption in the said bond to two brothers Ram Bharos and Ram Kumar, who sued for redemption of the mortgage of the 25th of July, 1823, against the heirs of Ishri Singh in 1884 and got a decree on the 22nd of November, 1884 In the plaint they set out the fact of the mortgage

*First Appeal No 218 of 1913 from an order of Guru Prasad Dube, Subordinate Judge of Allahabad, dated the 20th of June, 1913

(1) (1898) I L R., 25 Calc, 844. L R, 25 I A, 95

and alleged that the mortgage was a joint one, and as Parsidh Narain, son of Naipal Singh, had not joined in the suit, he was made a *pro formâ* defendant. Under the decree Ram Bharos and Ram Kumar obtained possession over the entire mortgaged property. The legal representatives of Parsidh Narain, son of Naipal Singh, brought this suit for redemption of the mortgage, *so far as the share of Naipal was concerned, against the heirs and* representatives of Ram Bharos and Ram Kumar in the year 1912. The court of first instance dismissed the suit on the ground that it was barred by limitation. The lower appellate court, relying on the plaint of the suit of 1884 as an acknowledgment under section 19 of the Indian Limitation Act of the right of Parsidh Narain to redeem the mortgage, reversed the decree and remanded the case. The defendants appeal.

Babu *Piari Lal Banerji*, for the appellants :—

Ram Bharos and Ram Kumar acquired the position of a mortgagees *quâ* the share of Naipal, and the period of limitation for a suit for redemption by the heirs of Naipal was sixty years from the date of the mortgage or the date fixed for payment; *Ashfaq Ahmad* v. *Wazir Ali* (1). When Ram Bharos and Ram Kumar filed their suit in 1884 they did not admit the liability which the plaintiffs now seek to enforce. A mere admission of any liability is not enough; *Gopal Rao Manohar Tambekar* v. *Hari Lal Subari Sevak* (2). *Jugal Kishore* v. *Fakhr-ud-din* (3), relied on by the court below, is distinguishable, inasmuch as the person making the acknowledgment in that case was acknowledging his own liability, but in the present case Ram Bharos and Ram Kumar were acknowledging the liability of the representatives of the original mortgagee and not a liability of their own It was an acknowledgment of the liability of a person, who was a mortgagee before Ram Bharos and Ram Kumar became mortgagees. All that was stated in the plaint was that one Janki Prasad was a mortgagee. There was no admission that they themselves were liable to be redeemed and there could not have been any such admission, as till then they had not acquired the mortgagee rights *quâ* the share of

(1) (1889) I. L. R., 14 All., 1. (2) (1907) 9 B. L. R., 715.

(3) (1906) I. L. R., 29 All., 90

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Naipal; *Ramkhel Mahton* v. *Nanhoo Singh* (1). Whatever rights Ram Bharos and Ram Kumar might have acquired under the decree, it is certain that they never became the representatives of the mortgagee and they never acknowledged their liability to be redeemed, but they shifted the liability to a third person, *i e*, to the representatives of Ishri Prasad. The case of *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (2) does not help the plaintiffs. The question was whether there was a joint liability to pay a certain debt. That joint liability was admitted and the suit was to enforce the same liability, it being a suit for contribution by one debtor against the other.

Munshi *Parmeshwar Dayal*, for the respondents, was not called upon.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—The facts of this case are as follows:—On the 25th of July, 1823, Mohan Singh, the eldest of three brothers, executed a deed of mortgage in favour of Ishri Prasad Singh in lieu of Rs. 601 in respect of the 5 anna 4 pie share of all the three brothers. Mohan Singh died leaving two sons Munni Singh and Naipal Singh. The descendants of Mohan Singh and his two brothers, with the exception of his second son, namely, Naipal Singh, executed a deed of sale on the 3rd of May, 1883, in respect of their shares in the equity of redemption in the 5 anna 4 pie share in favour of Ram Bharos and Ram Kumar. Ram Bharos and Ram Kumar instituted a suit for redemption in April, 1884, against the heirs of Ishri Prasad Singh in respect of the entire 5 anna 4 pie share mortgaged on the 25th of July, 1823. They stated in their plaint that they were transferees to the extent of 2 anna 8 pie share only. But as the mortgage *sought to be redeemed was one transaction and could not be split* up, and as the other persons interested in the redemption of the mortgage had not joined in the suit, the plaintiffs were seeking to redeem the entire mortgage and had made the other persons entitled to redeem *pro formâ* defendants in the case. Among the persons mentioned in the plaint as entitled to redeem was Parsidh Narain, son of Naipal Singh, who figured as defendant No. 9 in the case. The claim of Ram Bharos and Ram Kumar was decreed on the

(1) (1907) 6 C. L. J., 644. (2) (1898) I. L. R., 25 Calc., 844: L. R., 25 I. A., 95.

22nd of September, 1884 The present suit is brought by the representatives of Naipal Singh for the redemption of his share as against the legal representatives of Ram Bharos and Ram Kumar and some others The contesting defendants in the case are the representatives of Ram Kumar They resisted the suit on the ground among others of limitation It was said that the mortgage sought to be redeemed was dated the 25th of July 1823 and had become barred long prior to the institution of the suit The rejoinder for the plaintiff was that there was an acknowledgment in April 1884 which saved the limitation The court of first instance held that the claim was barred by limitation and dismissed it.

On appeal the learned Subordinate Judge disagreeing with the first court found that the claim was not barred by limitation. He accordingly set aside the decree of the first court and remanded the case under order XLI rule 23 of the Code of Civil Procedure for trial on the merits The defendants appellants have come up in appeal to this Court and contend that the claim of the plaintiffs respondents is barred by time. The point raised in this appeal depends upon the interpretation of section 19 of the Indian Limitation Act The provisions of that section are as follows — If before the expiration of the period prescribed for a suit or application in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing and signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability a fresh period of limitation shall be computed from the time when the acknowledgment was so signed It is contended on behalf of the appellants that the allegation in the plaint of 1884 that Naipal Singh s son was one of the mortgagors and had a right of redemp ion did not amount to an acknowledgment of liability on behalf of Ram Bharos and Ram Kumar to be redeemed themselves in case of success of their suit We think that this contention is not sound The statement in the plaint of 1884 by Ram Bharos and Ram Kumar that Naipal Singh s son had a right to redeem was an admission in respect of his right with regard to the property in suit This view is supported by the ruling in

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Sukhamoni Chowdhrani v. *Ishan Chunder Roy* (1). In that case one of the co-debtors admitted the debt in an application to the manager of the state. Another debtor paid off the debt and then sued for contribution. His claim was met with a plea of limitation; but it was rejected on the ground that the admission made in the petition to the manager amounted to an acknowledgment and saved limitation. We, therefore, think that the claim of the plaintiffs respondents is not barred by limitation and that the order of the court below was correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

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April, 29.

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott.

CHANGA MAL (DEFENDANT) v. THE PROVINCIAL BANK, LD (PLAINTIFF) DURGA PRASAD (DEFENDANT) v. THE PROVINCIAL BANK, LD. (PLAINTIFF) and JAGMANDAR DAS (DEFENDANT) v. THE PROVINCIAL BANK, LD. (PLAINTIFF) *

Company—Board of Directors—Allotment of shares by an irregularly constituted board—Notice of allotment not given to applicant—Liquidation—Contributory.

Held that an allotment of shares in a joint stock company made by an irregularly constituted board of directors is *primâ facie* invalid. *British Empire Match Company, Ld. Ex parte Ross* (2) referred to. But this defect may sometimes be cured if the articles of association of the company provide for the validation of an act done by a *de facto* director in a *bonâ fide* manner.

Held also that if no notice of allotment of shares in a company is given to an applicant before the company goes into liquidation, such applicant is not liable to be placed on the list of contributories. *In re Scottish Petroleum Company* (3), *Dawson* v. *African Consolidated Land and Trading Company* (4) and *British Asbestos Company* v. *Boyd* (5) referred to.

THESE were three appeals arising out of the proceedings in liquidation of the Provincial Bank, Limited, Meerut. It appears that the official liquidator called upon the three appellants to contribute the balance of the price of shares which had been allotted to them at different times by the board of directors of the bank. The appellants objected to be put on the list of contributories and supported their objections on several technical

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*First Appeal Nos 196, 197 and 198 of 1913 from orders of Muhammad Shafi, Additional Judge of Meerut, dated the 28th of June, 1913

(1) (1898) L. R., 25 I. A., 95
(2) 49 Law Times, 291.
(3) (1883) 23 Ch. D., 413
(4) (1898) 1 Ch. D., 6
(5) (1903) 2 Ch. D., 439.

pleas The learned Judge disposed of their objections in a very summary manner without discussing the objections or giving any reason for rejecting them In appeal three objections were urged on behalf of the appellants namely that the board of directors which allotted the shares to the appellants was not properly constituted that the allotment was made after an unreasonable delay and that no notice of allotment was given to or received by the appellants

Mr *D R Sawhny* and Pandit *Brajnath Vyas*, for the appellants

Mr *M L Agarwala*, for the respondent

MUHAMMAD RAFIQ and PIGGOTT JJ —The three appeals of Changa Mal Durga Prasad and Jagmandar Das, marked as Nos 196 197 and 198 respectively of 1913 arise out of the proceedings in liquidation of the Provincial Bank Limited Meerut. It appears that the official liquidator called upon the three appellants to contribute the balance of the price of shares which had been allotted to them at different times by the board of directors of the bank The appellants objected to be put on the list of contributories and supported their objections on several technical pleas The learned Judge disposed of their objections in a very summary manner without discussing the objections or giving any reason for rejecting them In appeal three objections are urged on behalf of the appellants namely, that the board of directors which allotted the shares to the appellants was not properly constituted, that the allotment was made after an unreasonable delay and that no notice of allotment was given to or received by the appellants

The first objection is founded on an alleged defect in the constitution of the board of directors which allotted the shares to the appellants It is said that under the articles of association the *least number of directors required to form a quorum was three* The board that allotted the shares to the appellants was composed of three persons, two of whom only were regularly appointed directors Changa Mal was allotted shares at a meeting held on the 17th of September 1910 at which three persons were present, *viz* Shafiq Ilahi, E A Roberts and Abdul Majid The first two were among the first three directors originally appointed and named in the articles of association Abdul Majid was according to the directors

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minute book, appointed at a meeting of the original directors held on the 1st of May, 1910 At that meeting only two directors were present, namely, E A Roberts and Shafiq Ilahi, and it was resolved that, as the third director Parbhu Dayal could not always attend, Fakir Chand and Abdul Majid should be added to the Board of Directors Under the articles of association in case of an occasional vacancy among the directors the remaining directors could appoint a properly qualified member of the company as director pending the confirmation of his appointment at a general meeting of the share holders But there was no vacancy, as Parbhu Dayal had not resigned, and, even if he had, only one person could be appointed in his place and not two Moreover, the name of Abdul Majid must have been added after the meeting of the 1st of May, 1910, and probably at the meeting of the 17th of September, 1910 The proceedings of the 17th of September, 1910, as recorded in the directors' minute book, at first mention the name of Fakir Chand as one of the three directors present But his name is scored off in pencil and that of Abdul Majid added in ink at the end The appellants suggest that the name of Fakir Chand was written at first in the hope that he could be present at the meeting, but as he did not come the name of Abdul Majid, a share holder, who was probably sent for at the time, was added, and in order to show that he was a director regularly appointed, his name was added to the proceedings of the 1st of May, 1910 That the suggestion as to the interpolation of Abdul Majid's name in the proceedings of the meetings of the 1st of May, 1910, and the 17th of September, 1910, is not unfounded reference is made to the circulation of a printed notice convening a general meeting for the confirmation of Fakir Chand's appointment and the absence of any such notice about Abdul Majid. The shares allotted to Durga Prasad and Jagmandar Das were allotted at a meeting held on the 7th of April, 1912, at which E.A. Roberts, Fakir Chand and H Hassan were present It is said that there is nothing to show that Fakir Chand's appointment was confirmed at a general meeting and his provisional appointment at the meeting of the 1st of May, 1910, was irregular. As to H. Hassan he was appointed in place of Shafiq Ilahi who resigned on the 4th of January, 1912 The Board that appointed H. Hassan consisted of E. A. Roberts and Fakir Chand and the approval and signature of

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Parbhu Dayal were obtained subsequently The allotment of shares to Changa Mal was thus by two regularly appointed directors only, *viz* E A Roberts and Shafiq Ilahi and to Durga Prasad and Jagmandar Das by one director only, *viz* E A Roberts As no business of the company could be transacted without a quorum of three directors the allotment of shares to the appellant was therefore, clearly invalid and the latter are not bound by such allotment In support of his contention that such an allotment is invalid at law the learned counsel for the appellants has relied on the case of the *British Empire Match Company, Limited, ex parte Ross* (1) We think that the objection of the learned counsel as to the irregularity in the appointment of Fakir Chand and Abdul Majid is well founded. But we cannot say on the evidence in the case that the name of Abdul Majid was inserted in the proceedings of the meeting of the 1st of May, 1910 after the meeting The appointment of H Hassan seems to have been regular as there was a vacancy in the board of directors and he was appointed to the vacancy by the remaining directors However, the objection for the appellant remains that on both the occasions *viz*, the 17th of September, 1910, and the 7th of April, 1912 there were only two regularly appointed directors as Abdul Majid in one case and Fakir Chand in the other was not a properly appointed director

It may also be conceded that the case relied upon by the learned counsel supports his contention that allotment of shares by an irregularly constituted board of directors is invalid But other cases some of them later, lay down that if the articles of association of a company validate an act done by a *de facto* director in a *bonâ fide* manner the courts will uphold his act, *vide*, *In re Scottish Petroleum Company* (2) *Dawson* v *African Consolidated Land and Trading Company* (3), *British Asbestos Company, Ld* v *Boyd* (4) In the present case article 96 of the articles of association of the bank is directly in point It is as follows —"The *bonâ fide* acts of the board of directors and of any committee appointed by it shall, notwithstanding any vacancy in the board or committee or any defect in the appointment of any

(1) 49 Law Times 291
(2) (1883) 23 Ch D 413
(3) (1898) 1 Ch D, 6.
(4) (1903) 2 Ch. D, 439.

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director or member, be as valid as if no such vacancy or defec had existed provided they were done in the case of any defe before its discovery" Now it is not said, or at least not proved, tha the appointment of Fakir Chand and Abdul Majid was made by the directors with the knowledge that they were acting against the rules of the company or that the allotment of shares was made to the appellants by the directors who were conscious of the defect in the constitution of their board It is neither alleged nor provec that the directors who allotted shares to the appellants acted in a *malâ fide* manner They no doubt thought that the board was regularly constituted and acted in a *bonâ fide* manner in allotting shares to the appellants The provisions of article 96 sufficiently cover, in our opinion the irregularity complained of by the appellants and validate the allotments made by the dire tors

The second objection that of unreasonable delay in awarding the shares, has no force If the appellants had declined to accept the shares allotted to them on the ground of unreasonable delay, their objection might have succeeded They cannot raise that objection against their being put on the list of contributories when the bank has gone into liquidation

The third objection as to the receipt of the notice of allotment must, we think prevail in the case of Jagmandar Das It has not been shown to us that any notice of allotment was received by him.

In view of our findings the result is that the appeals of Changa Mal and Durga Prasad fail and that of Jagmandar Das succeeds The appeals of Changa Mal and Durga Prasad are dismissed with costs and the appeal of Jagmandar Das is decreed with costs

Appeals nos 196 *and* 197 *dismissed*

Appeal no 198 *decreed*

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April 29

Before Mr. Justice Muhammad Rafiq and Mr Justice Piggott

KUNJ KISHORE AND OTHERS (APPLICANTS) v THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS LIMITED (OPPOSITE PARTY) *

Act No VI of 1882 (Indian Companies Act) section 76 and 77—Articles of association—Agent—Borrowing powers—Act No IX of 1872 (Indian Contract Act), section 237—Estoppel

The agents of a joint stock company—a joint Hindu family firm—borrowed a considerable sum of money on hundis executed by the managing member of

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* First Appeal No 61 of 1913 from an order of C E Guiterman Second Additional Judge of Aligarh, dated the 28th of February, 1913

the firm in the name of the company These hundis were signed with the name of the managing member simply, having nothing on the face of them to indicate that the person who signed them was signing as an agent and not in his personal capacity

The company had no valid articles of association and neither the memorandum of association nor table A of the Indian Companies Act, 1882, empowered the agents to borrow money. There were however, what purported to be articles of association, which, though legally invalid (they had never been registered) were treated by the company and submitted to the public as being the genuine and legally adopted articles of association of the company. These articles did give the agents of the company power to borrow

Held that the signature of the managing member of the agent firm was sufficient, and that, although the articles of association were not valid, yet the company was in the circumstances estopped from raising the plea of their invalidity against holders in due course of these hundis.

THIS was an appeal under section 169 of the Indian Companies Act, 1882. There was a company at Hathras known as the Shri Baldeo Mills, Ld, which went into liquidation This company had two permanent agents appointed by the Memorandum of Association One of these agents was the firm of Dip Chand Lalji Mal—a joint Hindu family firm doing business at Hathras, whose managing member was one Keshab Deo. This Keshab Deo drew a large number of hundis on behalf of the company, signing his own name to them, and sold them and placed the proceeds to the account of his firm When the Shri Baldeo Mills went into liquidation, the holders of the hundis so drawn put in claims before the official liquidator, who referred them for decision to the liquidating court (second Additional Judge of Aligarh). The liquidating court rejected the claims generally, holding that the hundis were not binding on the company.

The applicants appealed

The Hon'ble Dr. *Sundar Lal* and The Hon'ble Munshi *Gokul Prasad*, for the appellants.

Mr. *B E O'Conor*, for the respondent

MUHAMMAD RAFIQ and PIGGOTT, JJ—This is one of a series of appeals arising out of proceedings in liquidation in respect of a trading company known as the "Shri Baldeo Mills, Limited." In some of these appeals there are special circumstances to be considered, so that the decision in the present case (First Appeal from Order No. 61 of 1913) will not necessarily govern the whole

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series; but this appeal raises in a form free from accidental complications a single point which is common to all of them. The appellants are holders in due course of a number of bills of exchange, or hundis, which purport to be drawn on behalf of the Shri Baldeo Mills on themselves, in favour of a firm known as Dip Chand Lalji Mal. Their case is that the Shri Baldeo Mills are liable to them as principal debtors in respect of these hundis, for which they undoubtedly gave good consideration, and the firm of Dip Chand Lalji Mal as sureties. The official liquidator, in charge of the affairs of the Shri Baldeo Mills, referred the appellant's claim to the District Judge for a decision whether the company was in fact liable in respect of the same. The District Judge has found in the negative, hence this appeal. In the court below a number of objections, of what may be described as a formal or technical character, were taken to the validity of these hundis; but these have been decided in favour of the appellants. It did not appear to us that the propriety of the decision of the court below on this point was very seriously controverted on behalf of the respondent in the course of arguments before us. We are content to say that we find ourselves in agreement with the findings recorded by the learned Additional Judge in favour of the appellants, and with the reasons for the same which he has given in his carefully elaborated judgement. It must be remembered in connection with all objections taken in respect of the mere form of these documents that the proviso embodied in section 1 of the Negotiable Instruments Act (No. XXVI of 1881) exempts from the operation of that Act "any local usage relating to any instrument in an oriental language." We are satisfied that the hundis in question, when considered in the light of the common usage affecting such documents, do purport to be signed by one Keshab Deo as the authorized agent of the Shri Baldeo Mills Limited. The only question really in issue before us is whether the said Keshab Deo had valid authority, express or implied, to pledge the credit of the Mills in this way, and whether the Shri Baldeo Mills Limited are bound by his act, by reason of ratification or on some other principle of equity. This is the question which the court below has decided against the appellants. It has been very fully argued before us, and we may say at once that, after allowing all possible weight to the arguments which

determined the decision of the learned Additional Judge, we are not able to concur in that decision.

The memorandum of association of the Shri Baldeo Mills Limited provided that "Messrs. Dip Chand Lalji Mal of Hathras and Messrs. Narain Vishram and Company of Bombay shall be the permanent agents of the company," and went on to confer upon these agents, both jointly and severally, "subject to the general control of the directors for the time being of the company," very wide powers of management. These extended to the doing of "all such acts as are necessary for the carrying on of the business of the Company."

Now Keshab Deo was not only the managing director of the Shri Baldeo Mills Limited, but he was also the manager of the firm of Dip Chand Lalji Mal. His power to act for and on behalf of that firm has never been questioned What we have to determine therefore is whether the firm of Dip Chand Lalji Mal, as permanent agents of the Shri Baldeo Mills Limited, had power to pledge the credit of that company by executing in its name the hundis now in question. The memorandum of association above referred to was registered without any articles of association; and it is not denied that the result of this was to make the regulations given in Table A appended to the Indian Companies Act (No. VI of 1882) operative as the articles of association of the company, unless and until these were formally altered in accordance with the procedure laid down by sections 76 and 77 of the said Act. The regulations in Table A aforesaid do not of course provide for the peculiar case of a company like this Shri Baldeo Mills Limited provided by its memorandum of association with two sets of "permanent agents"; they do not help towards defining or limiting the powers of those agents in any way. The share-holders of the Shri Baldeo Mills Limited did, however, make an attempt to provide themselves with a complete and appropriate articles of association. They passed a most elaborate set of articles of association at a general meeting held on the 7th of November, 1905 and confirmed the same at a subsequent meeting. It was not shown to us in argument that these proceedings failed to satisfy the requirements of sections 76

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and 77 of the Indian Companies Act, except in one particular. The subsequent general meeting was held more than one month from the date of the first meeting at which the articles of association were passed It follows that the said articles, having neither been registered along with the memorandum of association, nor subsequently passed in the manner provided by law, could not take effect as "articles of association" so as to replace the general provisions of Table A of the Indian Companies Act in regulating the affairs of the Shri Baldeo Mills

This position was not controverted in argument on behalf of the appellants The arguments addressed to us on their behalf proceeded along various lines We were asked to consider the provisions of the memorandum of association in themselves, and the possible effect of the proceedings of the meeting of the 7th of November, 1905, regarded simply as resolutions passed by the entire body of share holders empowering certain agents to act for them Our attention was also drawn to various proceedings, both of the directors and of the share holders in general meeting which we were asked to treat as ratifications of the conduct of Dip Chand Lalji Mal in raising money on hundis for purposes of the Company We do not desire to go into these matters in detail, there was force in the arguments addressed to us from each of these points of view, but we prefer to base our decision on a slightly different ground. The strongest line of argument on behalf of the appellants was struck when we were asked to consider whether, when all is said and done, the appellants were not fully warranted, by the proceedings of the general body of share holders as well as of the directors of Shri Baldeo Mills Limited, in dealing with Keshab Deo as an agent fully empowered to act on behalf of that Company in this particular matter The principle applicable is that laid down by section 237 of the Indian Contract Act (IX of 1872) The firm of Dip Chand Lalji Mal were admittedly agents of the Shri Baldeo Mills Limited for a variety of purposes It is not really necessary for the disposal of this appeal that we should record a finding that their authority did extend to pledging the credit of the Mills by drawing these hundis provided it is clear to us that the appellants were induced by the words or conduct of the directors and share holders of the Shri Baldeo Mills to believe that

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such an act was within the scope of the authority of the agents of the firm Now it seems clear to us that the share holders and the directors aforesaid were not aware that the validity of the articles of association passed at the general meeting of the 7th of November 1905 was capable of being called in question They invariably treated them as the articles of association binding on the company and referred to them as such in a variety of proceedings not only at meetings of the directors but also at meetings of the share holders They published them for the information of the general public as the articles of association of the Shri Baldeo Mills Limited In one of the cases before us there is very specific evidence that parties from whom it was desired to raise a loan were referred to these articles when they desired to be satisfied as to the authority of the persons with whom they were dealing We need not labour this point, we are satisfied that by a long course of conduct the share holders of the Shri Baldeo Mills Limited did put forward the articles of association passed at the general meeting of the 7th of November 1905, as embodying regulations by which *they were prepared to be bound defining* the scope and limits of the authority conferred on the firm of Dip Chand and Lalji Mal as agents of the Mills

The question in issue therefore narrows itself down to this — Assuming the regulations adopted at the general meeting of the 7th of November 1905 to be in this matter binding on the share holders of the Shri Baldeo Mills Limited would those regulations empower the firm of Dip Chand Lalji Mal as agents for that Company, to pledge its credit as was done when Keshab Deo (as manager of Dip Chand Lalji Mal) executed the hundis in suit? A strenuous attempt was made in argument on behalf of the respondent to satisfy us that this question should be answered in the negative The provisions of paragraphs 105 107,108 and 109 of the regulations in question seem to us sufficiently clear on the point and still more so when considered in the light of the evidence as to the proceedings of the Shri Baldeo Mills Limited from the date of the incorporation of this Company and its dealings with the firm of Dip Chand Lalji Mal The Mills did acquire a site, construct buildings and purchase machinery of considerable value for the purpose of carrying on its business There are in the hands of the official

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liquidator assets exceeding two lakhs of rupees in value, obtained by the sale of these properties. The learned Judge of the court below was of opinion that the actual cost was considerably in excess of the sum realized in liquidation. Now the most striking feature in the history of this Company is that the bulk of this expenditure was met out of borrowed money, most of it borrowed through the firm of Dip Chand Lalji Mal. The curious system of account keeping adopted is explained in the judgement of the learned Additional Judge. It is only this system of account keeping which has prevented the appellants from establishing their claim beyond reasonable question by proving that the consideration paid by them for the hundis in suit actually went to the benefit of the Shri Baldeo Mills Limited. As a matter of fact it went into the hands of Dip Chand Lalji Mal, and this firm was continually making advances to the Shri Baldeo Mills, for whom they were agents. They have filed a claim before the Official Liquidator for over a lakh of rupees. The transaction effected by means of the hundis in suit has been argued before us as in substance a borrowing of money for the benefit of the Shri Baldeo Mills Limited. It might equally well be regarded as pledging of the credit of the Mills to enable the firm of Dip Chand Lalji Mal to recoup itself for advances previously made. From either point of view, the transaction was one, in our opinion, within the ostensible authority of the agency held by Dip Chand Lalji Mal under the resolutions passed at the general meeting of the 7th of November, 1905. The appellants paid money for these hundis in the belief that the agents held a valid authority under these regulations. We hold that, whether or not this belief was well-founded, it was induced by the conduct of the share-holders of the Shri Baldeo Mills Limited, and that the latter cannot now repudiate the authority of their agents.

We, therefore, set aside the order of the court below and allow the appellants' claim. The latter will get their costs.

Appeal decreed.

Before Mr Justice Tudball and Mr Justice Chamier

RUPAN BIBI (PLAINTIFF) *v* BHAGELU LAL (DEFENDANT)*

1914 April 29

Act No VII of 1889 (Succession Certificate Act) sections 16 and 18—Certificate of succession—Suit to set aside certificate and decree passed in favour of the holder.

A succession certificate granted under the provisions of the Succession Certificate Act 1889 is conclusive as against the debtor under section 16 of the Act, and it can be revoked by the District Judge only under section 18 of the Act No suit will lie to have a succession certificate and a decree obtained by the holder thereof set aside on the mere ground that the certificate was obtained by the use of false evidence

THE facts of this case were as follows :—

One Ajudhia Prasad died, and Bhagelu Lal applied to the District Judge for a succession certificate in order to enable him to collect debts due to the estate, among them being a debt due from Rupan Bibi After inquiry the District Judge granted a certificate, on the strength of which a suit was brought and a decree obtained against Rupan Bibi The present suit was then brought by Rupan Bibi, seeking to set aside the decree against her and the succession certificate granted to Bhagelu Lal upon the ground that the latter had been obtained by means of false evidence The court of first instance dismissed the suit The plaintiff appealed to the High Court

The Hon'ble Mr *Abdul Raoof* and Maulvi *Shafi-uz-zaman*, for the appellant

The Hon'ble Dr *Tej Bahadur Sapru*, for the respondent

TUDBALL and CHAMIER, JJ —This appeal arises out of a suit brought by the plaintiff appellant to have it declared that a certain succession certificate granted to the defendant by the District Judge on the 2nd of July, 1909, had been obtained by means of false evidence and should therefore be set aside, and also that a decree, dated the 23rd of March 1911, which had been passed on the basis of the said certificate might also be set aside It appears that one Ajudhia Prasad died, and the defendant applied to the District Judge for a succession certificate in order to enable him to collect debts due to the estate, among them being one due from the present plaintiff appellant After inquiry the District Judge granted the certificate A suit was brought against the present

*First Appeal No 410 of 1912 from a decree of B J Dalal District Judge of Azamgarh, dated the 7th of September, 1912

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plaintiff and was decreed. It is this decree which the present plaintiff seeks to set aside In our opinion no such suit will lie The certificate is conclusive as against the debtors under section 16 of the Succession Certificate Act It can be revoked by the district court under section 18 of the same Act, and in our opinion no suit will lie to have the certificate and the decree set aside on the mere ground that the certificate was obtained by the use of false evidence The appeal fails and is dismissed with costs

Appeal dismissed

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April 30

Before Sir Henry Richards, Knight Chief Justice and Justice Sir Pramada Charan Banerji

MUHAMMAD AMIR AND OTHERS (PLAINTIFFS) v SUMITRA KUAR AND OTHERS (DEFENDANTS) *

Civil Procedure Code (1908), *section* 11—Res judicata—*Suit by plaintiffs as members of the Muhammadan community for a declaration that certain property was waqf—Previous similar suit by other plaintiffs*

Where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property and it had been decided that the property in question was not waqf *held* that this decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration.

THIS was a suit by nine plaintiffs who sued as members of the Muhammadan community and asked for a declaration that a certain mosque, mausoleum the site of an *imambara*, together with a flower garden appertaining to the mosque and *imambara*, and a pacca well were waqf property, and also other reliefs The main defence was that the suit was barred by the principle of *res judicata* upon the following facts In 1887 two persons had brought a suit in respect of certain property, including that now in suit, against the predecessors in title of the present defendants who were auction purchasers in execution of a decree against one

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MUHAMMAD AMIR v. SUMITRA KUAR

Mr *A P Dube* for the respondents

RICHARDS C J and BANERJI J —This appeal arises out of a suit in which the plaintiffs who are nine members of the Muhammadan community claimed a declaration that a certain mosque mausoleum the site of an *imambara* together with a flower garden appertaining to the mosque and *imambara* and a pacca well built by Choti Bibi are waqf property and that a western door which appertained to the waqf property might be re-opened, and other reliefs Both the courts below have dismissed the suit as barred by the principle of *res judicata* It appears that in the year 1887 two persons brought a suit in respect of certain property which included the property now in suit against the predecessors in title of the present defendants who were auction purchasers in execution of a decree against one Abdullah Khan. In that suit it was expressly held that the plaintiffs had failed to prove that the property or any part thereof was waqf It is said on behalf of the appellants that the litigation in 1887 to which we have just referred was not identical with the litigation in the present case In the litigation of 1887 there were two plaintiffs Both claimed as members of the Muhammadan community that the property was waqf and one of them claimed that he was the *mutawalli* It seems to us therefore that the very same question which is involved in the present suit was involved in the previous litigation.

It is next said that the plaintiffs in the previous litigation were litigating not as members of the public but in their private capacity We think that this contention cannot be sustained It was necessary for them in the first instance to establish as members of the public that a valid waqf had been created. There can be no question that they were litigating *bona fide* We think therefore that under the circumstances of the present case the plaintiffs in the previous litigation were persons litigating *bona fide* in respect of a public right claimed in common for themselves and others and therefore the present plaintiffs must be deemed to be persons claiming under the plaintiffs in the previous litigation

It is lastly contended that in the previous litigation the defendants admitted the right to worship. There is no doubt

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a statement in the judgement that the defendants had "no objection to the mosque being used." This seems to be a mere statement relating to the litigation then before the court. In the present case the plaintiffs expressly claim that the mausoleum and a certain specified plot are waqf property. In our opinion this question was finally decided in the previous litigation which held that it was not waqf. Under these circumstances we think that the decree of the court below was correct and ought to be affirmed We accordingly dismiss the appeal with costs.

Appeal dismissed.

1914 *May*, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

BISHESHAR DAYAL AND ANOTHER (PLAINTIFFS) v JWALA PRASAD AND ANOTHER (DEFENDANTS)*

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Wagering contract—Purchase of grain pit through agent—Intention of parties*

The plaintiffs who were commission agents, purchased for the defendants at their request a grain pit. The defendants, however, did not pay the price agreed upon and the plaintiffs resold the pit at a loss They then sued the defendants to recover the loss on the resale of the pit and their commission. *Held* that, whether or not it might have been the intention of the parties that the grain pit should be resold as it was, the defendants making a profit or bearing a loss on the transaction, the transaction between the parties was not a wagering contract within the meaning of section 30 of the Contract Act. *Forget* v. *Ostigny* (1) and *Jagat Narain* v. *Sri Kishan Das* (2) followed.

THE facts of this case were as follows :—

The plaintiffs alleged that they purchased a grain pit full of grain for the defendants under their instructions. Under a custom prevailing at Hapur the defendants were bound to take delivery of the goods before a certain time, but that they failed to do so. Thereupon the plaintiffs under the terms of the contract sold the grain at a loss and brought the present suit for recovery of the difference in price and their commission. The defence was that the transaction was of a gambling nature. The court of first instance found that the grain pit as a matter of fact existed; that it was purchased for the defendants under their instructions, but

* Second Appeal No 140 of 1913 from a decree of D L Johnston, District Judge of Meerut, dated the 24th of September, 1912, reversing a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 1st of July, 1912.

(1) (1895) A. C., 318. (2) (1910) I. L. R., 33 All., 219.

that it was not the intention of the defendants that they should take delivery of the grain, but it was to be sold through the plaintiffs as agents for the defendants who were to get the profits or pay the loss. It found that the transaction did not amount to a gambling transaction and gave the plaintiffs a decree. The lower appellate court came to a different conclusion and dismissed the suit.

The plaintiffs appealed to the High Court.

Dr. *Satish Chandra Banerji* (with whom the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellants.

It is an admitted fact that the grain pits were in existence, it is also admitted that the plaintiffs bought the grain pits as defendants' agents. The plaintiffs were merely commission agents who acted *bonâ fide* and on the defendants' refusal to take delivery, had sold the goods at the market rate. As far as they are concerned it is immaterial whether the defendants intended to take delivery or not or whether the defendants bought the grain pits with the intention of gambling. This is not a case where two principals enter into an agreement with the clear intention and knowledge that they are entering into a gambling transaction. But in a case like the present one when there is a third party in between and acts *bonâ fide* and pays earnest money and is forced to sell the goods and suffer a loss it cannot be said that there is any presumption in law which would make the contract invalid; *Shibho Mal* v. *Lachman Das* (1), *Forget* v. *Ostigny* (2) and *Sir E. Sassoon* v. *Tokersey Jadhawjee*, (3).

Mr. *B. E. O'Conor* (with whom Munshi *Gulzari Lal*), for the opposite party :—

In this case there was a clear finding of the court below that plaintiffs were themselves gamblers and these pits have been changing hands constantly and have all along been treated as a paper transaction. The mere fact that grain pits were in existence would make no difference. What the courts have to see is the intention of the parties ; *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (4). The present case was easily distinguishable from cases relied on by the other side. Here is a case in which an agent entered into a contract knowing full well that the transaction he was

(1) (1901) I. L. R., 23 All., 165.
(2) (1895) A. C. 318.
(3) (1901) I. L. R., 23 Bom., 616, (621).
(4) (1901) I. L. R., 29 Calc., 461.

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entering into was a mere paper transaction Now he comes forward and claims equitable relief He further submitted that such a contract was *ab initio* void under section 30 of the Contract Act It is clear from the finding of the court below that both the parties entered into a contract with the intention of gambling and it cannot be contended that such a contract is not a wagering contract

RICHARDS C J and BANERJI, J —This appeal arises out of a suit in which the plaintiffs claimed money from the defendants as payable to them in connection with the sale of the contents of a grain pit The plaintiffs in their plaint alleged that they were commission agents and were employed by the defendants to purchase the grain pit that they did purchase it on behalf of the defendants but that subsequently the defendants being unwilling or unable to pay the balance of the purchase money or to give security the grain pit was re sold at a loss and their claim is made up of their commission and the difference between the price at which the pit was purchased and re sold The defence was that the transaction was a gambling transaction, and further that the pit was re sold without the authority of the defendants The court of first instance granted a decree to the plaintiffs holding that the transaction was not in the nature of an agreement by way of wager, within section 30 of the Indian Contract Act The lower appellate court held that the transaction was a gambling transaction and that the money could not be recovered Hence the present appeal

In our opinion the actual facts have been ascertained by the court of first instance and the lower appellate court has not in any way dissented from such findings of facts No doubt it has drawn certain legal inferences from those facts The facts are as follows The grain pit in question with its contents did in fact exist It originally was purchased by the plaintiff It was sold to various persons, and eventually was purchased by the plaintiff as commission agents on behalf of the defendants It is contended on behalf of the respondents that all these sales were mere paper transactions and that the plaintiffs themselves were all along the owners of the grain pit This clearly is not so, and is not the finding of either of the courts below. The defendants by their written statement

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admitted that the plaintiffs were commission agents They also admitted that the grain pit in question was purchased on their behalf by the plaintiffs as their commission agents We have looked into the evidence of the principal defendant Parmanand and we find that what the learned Subordinate Judge says at page 11 about the transaction is quite justified It may be assumed for the purposes of the present case that there was very small probability of the defendants ever clearing the grain pit and that the probabilities were that they would resell the contents of the grain pit through the plaintiffs as commission agents, getting the benefit of any rise in prices or suffering any fall It may also be assumed that the plaintiffs were aware that this was the intention of the defendants Parmanand in his evidence admits that there were a number of other transactions of a similar nature and that upon one occasion he actually took delivery of grain and cleared the pit The question that we have to decide is whether under these circumstances the plaintiffs are prevented by the provisions of section 30 A. of the Indian Contract Act from recovering the moneys which they had to pay to the vendor of the grain pit In our opinion they are not On the facts stated above the case is very similar to the case of *Forget* v *Ostigny* (1) and also to the case of *Jagat Narain* v *Sri Kishan Das* (2) On the principle of these cases it cannot be said that the claim of the plaintiffs is based on an ' agreement by way of wager '

It is contended that the grain pit was sold unlawfully and without the authority of the defendants We have looked into the contract and we find that there was an express provision that if there was any question as to the solvency of the purchaser and if he failed to pay the balance of the purchase money or to give security the contents of the pit might be resold The learned Subordinate Judge says —' Parmanand admits that the plaintiffs made demands and that he had no money to pay, and was offering to make *itminan* His partner Jwala Prasad made promises of payment but did not or could not keep them Under these circumstances and having regard to the terms of the contract it is quite clear that the contents of the grain pit were liable to be

(1) (1895) A. C. 318   (2) (1910) I. L. R. 33 All., 219

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resold and accordingly the defence on this ground cannot be sustained.

The result is that we allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Chamier.

1914 *May,* 1.

SITAL PRASAD v. THE MUNICIPAL BOARD OF CAWNPORE*

Act (Local) No I of 1900 (United Provinces Municipalities Act), section 147—Conviction for disobedience to notice—Continuing breach.

After a conviction under section 147 of the United Provinces Municipalities Act the person convicted cannot be permitted to challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the board.

IN this case one Sital Prasad was ordered by the Municipal Board of Cawnpore to pull down a *chajja* which was alleged to be in a ruinous and dangerous condition. On his disobeying the order he was prosecuted under section 147 of the Municipalities Act and was fined Rs 5. As he persisted in disobeying the Board's order he was prosecuted again and was fined Rs. 20 at the rate of Rs. 2 for each day that elapsed since the original conviction. At the second trial he wished to challenge the correctness of the first conviction by showing that the Board's notice was illegal and so forth. The Magistrate refused to allow this to be done Sital Prasad then applied in revision to the High Court.

Mr. *A. P Dube*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—The applicant was ordered by the Municipal Board of Cawnpore to pull down a *chajja* which was alleged to be in a ruinous and dangerous condition. On his disobeying the order he was prosecuted under section 147 of the Municipalities Act and was fined Rs. 5. As he persisted in disobeying the Board's order he has been prosecuted again and he has been fined Rs. 20 at the

* Criminal Revision No. 233 of 1914 from an order of H. G. S. Tyler, District Magistrate of Cawnpore, dated the 5th of February, 1914

rate of Rs 2 for each day that elapsed since the original conviction At the second trial he wished to challenge the correctness of the first conviction by showing that the Board s notice was illegal and so forth. The Magistrate refused to allow this to be done and in my opinion the view taken by the Magistrate is correct Before the institution of the second prosecution the applicant challenged the correctness of the first conviction by means of applications to the District Magistrate and to this Court but his applications were thrown out It seems to me impossible to hold that after a conviction under section 147 the person convicted may challenge the correctness of that conviction as often as he is prosecuted for continued disobedience of the order of the Board The correctness of the first conviction cannot now be challenged

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This application for revision is dismissed.

Application dismissed

APPELLATE CIVIL

Before Sir Henry Richards Knight Chief Justice and Justice Sir Pramada Charan Banerji

1914 *March* 20

ALI HUSAIN AND OTHERS (DEFENDANTS) v FAZAL HUSAIN KHAN (PLAINTIFF)*

Muhammadan law—Shia school—Waqf—Marz ul maut—Validity of waqf made in marz ul maut

Under the Sh a law a waqf made in death illness is valid only to the extent of one th rd if not assented to by the heirs even f possession has been del vered by the maker of the waqf *Nazar Husain* v *Rafeeq Husain* (1) approved.

THE facts of this case were as follows —

One Gazanfar Husain died on the 13th of May 1907 having two days before his death namely on the 11th of May, made a waqf of certain property and placed the trustees in possession The present suit was brought by Fazal Husain Khan who claimed to be the heir of Gazanfar Husain and also of one Azima Bibi, aunt of Gazanfar Husain to whom it was alleged that part of the waqf property belonged and he claimed possession upon the ground that the waqf was invalid according to the Muhammadan law applicable to the Shia sect to which the deceased belonged

* First Appeal No. 308 of 1911 from a decree of J H Cuming, District Judge of Jaunpur dated the 23rd of May 1911.

(1) (1911) 8 A L. J., 1154.

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The court of first instance found that Gazanfar Husain was suffering from death illness when he made the waqf, but that he was in full possession of his senses and that he made over possession to the *mutawallis*. On these findings it held that the waqf was valid to the extent of one third only and gave the plaintiff a decree, but for some what less than his claim. The defendants appealed to the High Court and the plaintiff also filed objections as to so much of the claim as had been dismissed.

The Hon'ble Dr. *Sundar Lal*, for the appellant.

Dr. *S. M. Suleman* (with Mr. *B. O'Conor*) for the respondent.

RICHARDS, C.J. and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff respondent for possession of property the bulk of which belonged to one Gazanfar Husain. The remainder of the property is alleged to have belonged to Azima Bibi, sister of the plaintiff and aunt of Gazanfar Husain. The plaintiff claims as heir to both these persons.

Gazanfar Husain died on the 13th of May, 1907, but two days before his death, that is, on the 11th of May, 1907, he executed a deed of waqf in respect of the whole of the disputed property under which the appellants were appointed trustees of the waqf. The validity of the waqf is disputed by the plaintiff on various grounds, the principal grounds being that the donor was suffering from death illness (*marz ul-maut*), that he had no mental capacity to make the waqf, and that possession was not delivered under it. The court below has found that Gazanfar Husain was suffering from death illness of which he died that he was in the full possession of his senses when he made the waqf and that he delivered possession of the property to the *mutawallis*. On these findings the learned Judge has held the waqf to be valid only as regards a one third share by reason of *marz ul maut* (death illness) and has granted a decree to the plaintiff for a part only of the property claimed. The defendants have preferred this appeal and the plaintiff has filed objections under order XLI, rule 22 of the Code of Civil Procedure, as regards the portion of the claim dismissed.

Accepting the findings of fact of the court below, the appellants contend that as possession was delivered the waqf is valid in

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respect of the entire property, under the Shia law It is admitted that Gazanfar Husain belonged to the *Asna Asharya* or Imamia sect of Shias It is stated however, that he was an *Asuli* and followed the tenets of that school among Imamias, but this is denied by the plaintiff Holding the view that we do, we deem it unnecessary to determine whether he was an *Asuli* or an *Akhbari*

It is common ground that among Sunnis, who comprise the great majority of the Musalmans of India a gift or waqf made in mortal illness (*marz ul maut*) unless assented to by the heirs, is valid only to the extent of one third. It is urged, however, that a different rule prevails among Shias If this is so we should apply in the case of Shias the law of that sect under the rule of justice equity and good conscience which we are bound to administer [See the ruling of their Lordships of the Privy Council in *Rajah Deedar Hossein* v *Ranee Zuhoor oon Nissa* (1)] We have, therefore, to determine whether under the Shia law a waqf made in death illness is valid as regards the entire property if possession has been delivered under it

The case has been argued with great ability on both sides and various original texts of writers on Shia law have been cited. Many of these works have not yet been translated into English and we have been supplied with translations by the learned counsel of the parties The opinions of these writers as is usual in such cases, are conflicting and we have to ascertain as best we can what has been regarded as the law on the subject hitherto among Shias in this country

We shall first consider the opinions of English text writers on the subject

In Baillie s Digest of Muhammadan Law, Imamia Sect in the chapter on waqfs, the learned author says at p 212 —' The contract is not rendered obligatory except by giving possession, but when so completed it cannot be revoked if made in health, and even when made in death illness it is equally valid if allowed by the heirs, though if disallowed by them, it is valid only to a third of the deceased s estate, in the same way as a gift or a *muhabat* in sale. Some of our doctors insist that it should be sustained out

(1) (1841) 2 Moo. I. A. 441.

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of the whole of the estate; but the first opinion is the more approved. If one in death-illness should make a waqf a gift, a *muhabat* sale, and also emancipate a slave and neither of the acts is allowed by his heirs, all are valid if they can be carried into effect out of a third of his estate'. The above remarks are based on the Sharaya-ul-Islam which was printed in India so far back as 1839.

In the Tagore Law Lectures for 1874 by Shama Charan Sircar, the rule on the subject is thus laid down (p. 864):—"Made in death-illness, a waqf or appropriation becomes valid (to the full extent) if allowed by the heirs; otherwise only to the extent of a third (of his property) in the same way as a gift or *muhabat* in sale". The learned author had before him and consulted almost all the works of authority on Shia law, including the works on which the appellants rely (see p. 169 *et seq*), and he also referred, as he states in his preface, to the Mujtahid (" law doctor ") of Lucknow. So that it cannot be said that he deduced the above rule without consulting all the authorities on the subject.

The latest writer on the subject is the Right Hon'ble Mr. Ameer Ali. In the first volume of his well known work on Muhammadan Law he states the Shia law as to waqf made in death-illness in the following terms on p. 531 (4th edition.):—"If a waqf be constituted at a time when the *wáqif* is suffering from a death-illness, and there is a clear indication of an intention on his part to transfer possession, it will take effect with reference to the entirety of the dedication, provided the heirs consent either before or after the death of the *wáqif*, otherwise the waqf will operate only in respect of one third of the estate of the testator. For a waqf is like other acts which take effect immediately, such as *hiba*, sale and similar obligations. If the waqf property is covered by one third of the estate, then it is valid as regards the entirety of the dedication. If not, each provision will be given effect to with regard to its priority until one third of the estate is exhausted." This learned author also has referred in the introduction to his book to the various Shia jurists on whose authority his conclusions are founded, and among them he enumerates the works of Abu Jafar at-Tusi, to which we shall

refer hereafter and on which much of the argument on behalf of the appellants is based

The result of the above authorities is that among Shias a waqf made in death illness is valid only to the extent of one third of the estate of the maker of the waqf unless assented to by his heirs even where the waqf is of immediate operation

The above view is in consonance with the opinion of a large number of later writers on Shia law the principal among whom is Shaikh Najm ud din Abdul Kasim Jafar, the author of the Sharaya ul Islam As has been stated above this work was published in India so far back as 1839 and portions of it have been translated by Mr Baillie According to Mr Shama Charan Sircar it is a work of the highest authority, at least in India and is more universally referred to than any other Shia law book and is the chief authority for the law of the Shias in India (Tagore Law Lectures 1874 p 171) Its great influence among Shias is referred to by Mr Ameer Ali though he considers the influence to be "baleful" Mr Justice Mahmood in his judgements in *Abbas Ali* v *Maya Ram* (1) and *Agha Ali Khan* v *Altaf Hasan Khan* (2) described this work as one "of the greatest authority among Shias" and as being "the most authoritative text book of the Shia law" Their Lordships of the Privy Council in the case of *Baqar Ali Khan* v *Anjuman Ara Begam* (3) regarded the Sharaya ul Islam as "the most authoritative work" of the Shia school In this work the rule is thus stated — If a man were to make waqf and die without giving possession the waqf would be void, but if a waqf be made in death bed and possession be given then it will take effect to the extent of a third if the heirs do not consent Without possession the waqf fails whether made in health or illness It (the waqf) does not become binding except by delivery of possession and when completed (by delivery of possession) it cannot be revoked if made in health, but if made during illness and allowed by heirs it is operative in full, otherwise it is valid as regards a third" (Ameer Ali, p 499, note)

(1) (1888) I L R 12 All 229 (2) (1892) I L R, 14 All 429

(3) (1902) I L R 25 All, 236 (255)

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The same view is held by the authors of Jawahir ul Kalam Musalik ul Afham, Jamaa ul Muqasid Mukhtasar Shara i Lama and other works regarded as authoritative among Shias They refer to the existence of a contrary opinion among some of the earlier writers, but they consider the view adopted by them as the better and more approved view

On the other hand we find that some other writers have held a different opinion Of these the principal authority, relied upon by the appellants, is that of Abu Jafar at-Tusi the author of Khalaf us Shaikh the Nihaya the Istibsar, the Tahzib-ul Ahkam and the Mabsut The last of these, the Mabsut, is referred to by Mr Ameer Ali as a work of great authority The appellants have also referred to the Muqnia by Mufid the Intisar by Murtaza, the Ghunia by Ibn Zuhra the Al Sarair by Ibn Idris, the Burhan i Qata, and the Jamaa us Shattat, a collection of traditions published in Persia in the last century Other authors of less note have also been referred to Translations of extracts from all these authors have been placed before us and their correctness is generally admitted In the Khalaf us Shaikh the author, Abu Jafar at Tusi, states as follows —

The lawyers are unanimous that a disposition by a sick person exceeding one third of his property is invalid if this disposition is not to have immediate operation (*ghair munnazziz*) If the act is to have immediate operation (*musrajjizat*) such as, for example, a manumission, gift and *muhabat*, there are among us two opinions one of which is that it is valid and the other that it is invalid The latter is the view of Shafai and all the Jurists (Sunnis) They do not mention any difference of opinion Our arguments for the first opinion are the traditions prevalent according to the narration of our *ulamas* which we have mentioned in our book (the Tahzib)" A similar statement is contained in the Nihaya and the Istibsar In the Tahzib-ul Ahkam the tradition referred to is that of Abu Abdullah who said that 'a dying man has the best right to his property so long as there is life in him.' This tradition is derived from Amar and Samaah both of whom ing to the author of Jamaa ul Muqasid, unreliable I work the Mabsut he refers to of opinions among Shia jurist

rule to be that the disposition takes effect as regards one third only He does not give preference to one opinion over the other The names of the authors holding conflicting views on the points are enumerated in the Burhan i Qata It is clear however that later writers whose works are regarded as of the highest authority and have hitherto been followed in India, are of opinion that a waqf made in death illness is valid only to the extent of one third In this conflict of opinions we see no reason to disregard what has till now been regarded as of paramount authority and follow texts (some of them obscure) which were practically unknown among Shias in this country The danger of adopting the latter course was pointed out by their Lordships of the Privy Council in *Baqar Ali Khan* v *Anjuman Ara Begam* (1), to which we have already referred At p 254 of the report their Lordships say — Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative" It is not easy to reconcile conflicting opinions on a question like this No doubt as a general proposition a man is the owner of his property as long as he lives and may dispose of it in any manner he likes But the Muhammadan law is jealous of acts which interfere with the expectations of heirs and is always anxious to maintain their rights It is this jealousy which seems to be at the root of the rule that a will can only take effect as to one third, unless assented to by heirs Apparently on the same principle in the case of a disposition in death illness (*marz ul-maut*) without the consent of heirs, the disposition is held to be valid as regards one third only, as in the case of a will As a donor suffering from death illness has only a short time to live, his disposition can come into actual operation only after his death and is for all practical purposes a will The contention of the learned counsel for the respondent to this effect seems to us to have much force

In regard to the plea of the appellants that Gazanfar Husain was an *Asuli* and therefore the waqf made by him should be governed by the views of Shaikh Tusi and the author of the Intisar, which according to Mr Ameer Ali are in force among

(1) (1912) I. L. R., 25 All., 236.

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Asulis we may observe in the first place that no issue was raised in the court below as to whether he was an *Asuli* or an *Akhbari*. In the next place he himself made no distinction between these schools in the deed of waqf. According to the terms of that document the benefit of the waqf was to be enjoyed by all *Asna Asharayas*, irrespective of the school to which they belonged. Furthermore we may observe that in spite of the views of Shaikh Tusi and the other writers whose opinions coincided with his Mr. Ameer Ali himself laid down the rule about the validity of waqfs made in death illness which we have quoted above and made no distinction between *Asulis* and *Akhbaris*. We are therefore unable to accede to the argument put forward on behalf of the appellants in this respect.

In our opinion the weight of authority is in favour of the view that under the Shia law a waqf made in death illness is valid only to the extent of one third, if not assented to by the heirs even if possession has been delivered by the maker of the waqf. A similar view was held by Mr. Justice PIGGOTT in the case of a gift in *Nazar Husain* v. *Rafeeq Husain*(1). The decision of the court below on this point is, in our judgement, correct. The other pleas taken in the memorandum were not and in our opinion could not be seriously pressed. The appeal must therefore fail.

[Their Lordships dealt with the objections of the respondent and proceeded.]

The result is that we dismiss the appeal with costs. We allow the objection of the plaintiff to this extent that we vary the decree of the court below by granting the plaintiff a decree for an 8 anna ⅓rd pie share of all the property claimed. In other respects we affirm the decree of the court below. The parties will pay and receive costs in both courts in proportion to failure and success. We direct that the defendants shall be entitled to be recouped out of the trust estate any costs which they may pay to the plaintiff under this decree.

Decree modified.

(1) (1911) 8 A. L. J., 1154.

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1914
May 2

AMINA BIBI (JUDGEMENT DEBTOR) *v* BANARSI PRASAD (DECREE HOLDER).*

Act No IX of 1908 (Indian Limitation Act) schedule I article 182—Execution of decree— Step in aid of execution - Substituted service

Held that an application by a decree holder seeking to execute his decree for substituted service on the judgement debtor is an application to take some step in aid of execution within the meaning of article 182 (5) of the first schedule to the Indian Limitation Act 1908 *Pitam Singh* v *Tota Singh* (1) referred to

THIS was a decree holder's appeal arising out of an application for execution, against assets of the deceased in the hands of his widow, of a decree which had been granted against one Amir Ahmad The principal objection taken by the widow was that execution of the decree was barred by limitation the present application being made more than three years after the last previous application for execution The facts of the case are fully stated in the judgement of the Court

Dr *Satish Chandra Banerji* for the appellant

Mr *J Nehru*, (for the Hon'ble Pandit *Moti Lal Nehru*) and Munshi *Gulzari Lal*, for the respondents

MUHAMMAD RAFIQ and PIGGOTT, JJ —This appeal has arisen out of proceedings in execution. The decree holder Banarsi Prasad obtained a simple money decree on the 24th of August, 1900, against one Amir Ahmad The latter died leaving two widows, a son, a daughter and two paternal uncles as his heirs He died indebted to a considerable extent and his creditors had obtained decrees against him Banarsi Prasad made several attempts to execute his decree and it was paid off partially in 1905 On the 16th of March, 1909, Banarsi Prasad filed an application for execution of his decree against the present appellant Musammat Amina Bibi, one of the widows of Amir Ahmad The decree holder asked for attachment and sale of certain property in the possession of Amina Bibi alleging it to have originally belonged to Amir Ahmad, the judgement-debtor As this application of the 16th of March, 1909, was filed more than a year after the last application for execution the court ordered notice to issue to Amina Bibi The notice was not served on her, and on the 2nd of

* First Appeal No 188 of 1913, from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 14th of April 1913

(1) (1907) I. L R., 29 All., 201

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August, 1909, the decree-holder made an application giving a fresh address and asking for issue of a fresh notice to Amina Bibi. Notice again came back unserved, and on the 24th of August, 1909, the decree holder again filed a second application asking for substituted service, on the ground that, as Amina Bibi was a *pardanashin* lady, it was difficult to serve notice on her in the ordinary manner On the date fixed for hearing the pleader for the decree holder stated that he would be satisfied if another attempt were made by the process server accompanied by a servant of the decree-holder to serve Musammat Amina Bibi The request of the pleader for the decree holder was allowed and notice was issued and served on her. No further steps seem to have been taken after service of the notice to her until the 12th of July, 1912, when a fresh application was made for execution By that application the decree holder sought to attach and sell some portion of the personal property of Amina Bibi, which he described as having originally belonged to the judgement debtor, Amir Ahmad Amina Bibi put in objections She said that the property sought to be attached was her personal property and was not liable to attachment and sale in execution of the decree against her husband For the decree holder it was alleged that, even if the property sought to be attached and sold was the personal property of Amina Bibi, it was still liable under the decree against her husband as she had received considerable assets of her husband which she had not accounted for The learned Subordinate Judge held that the property which the decree holder was seeking to attach and sell was the personal property of Amina Bibi, but he (the decree-holder) was at liberty to prove his allegation that certain assets of her husband had come into her hand Subsequently to that order the parties admitted that Musammat Amina Bibi had realized Rs 30,000, as profits from the landed estate of her husband. She, however, objected to her liability to pay off the decree of Banarsi Prasad on several grounds She said that the application of the 12th of July, 1912 was barred by limitation and that the profits realized were in respect of property which had been gifted by Amir Ahmad to his other widow, Musammat Haidari, and the realization of profits of that property by Amina Bibi could not be said to be assets of her deceased husband There were

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some other objections taken which need not be mentioned here The learned Subordinate Judge disallowed all objections and allowed execution of the decree to proceed Musammat Amina Bibi has come up in appeal to this Court and she repeats two of her objections to the execution of the decree She contends that the application for execution is barred by limitation and that she is liable to the extent of $\frac{1}{24}$th of her husband's debt because her share as a widow in the property is only $\frac{1}{24}$th We think that neither of the contentions of the appellant has any force The limitation is saved by the application of the 24th of August, 1909 That a similar application has been held to be a step in aid of execution is borne out by the ruling in *Pitam Singh* v *Tota Singh* (1) Her second objection also fails because she is in possession of the assets of her husband and she is liable to the extent of those assets to the creditors of her husband Her allegation that she will have to account for the assets to the other heirs of her deceased husband is true but she can always say that she had to pay so much for the satisfaction of the decree of her husband for which all the heirs were liable The appeal fails and is dismissed with costs

Appeal dismissed

FULL BENCH

Before Sir Henry Richards Knight Chief Justice Justice Sir Pramada Charan Banerji and Mr Justice Tudball

1914 May 2

GULZARI MAL AND ANOTHER (PLAINTIFFS) v JAI RAM (DEFENDANT) *

Act (Local) No II of 1901 *(Agra Tenancy Act) section* 194—*Lambardar—Right of lambardar to eject tenants—Suit in ejectment—Other co-sharers not necessary parties*

Held that when a lambardar in a lambardari village sues to eject a tenant he is not bound to join the other co sharers as parties

Semble that section 194 of the Tenancy Act was not intended to apply to the case of a lambardari village *Bhambhar Nath* v *Bhullo* (2) distinguished

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court The facts of the case appear from the judgement under appeal which was as follows —

* Appeal No 97 of 1913 under section 10 of the Letters Patent

(1) (1907) I. L R. 30 All 301 (2) (1911) I. L R. 34 All, 98

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GULZARI MAL v. JAI RAM

This appeal arises out of a suit brought by the plaintiffs appellants to eject the defendant respondent, on the allegation that he was a non-occupancy tenant of the plots from which he was sought to be ejected. He resisted the suit on several grounds. He said that the plaintiffs appellants could not sue alone as the lands in respect of which ejectment was sought were part of a joint khata and there were other co-sharers of that khata, including the defendant respondent himself. It was further urged in defence that the defendant respondent having become a co-sharer in the joint khata was not a mere non-occupancy tenant and could not be ejected. The court of first instance decreed the claim. On appeal the learned District Judge held that the plaintiffs appellants could not sue alone in view of the provisions of section 194 of Act II of 1901. The plaintiffs have come up in second appeal to this Court. They contend that as they are the lambardars of the mahal in which the defendant respondent is a tenant they can sue to eject him, the provisions of section 194 of the Tenancy Act notwithstanding. In support of this contention reliance is placed on a ruling of the Board of Revenue of 1903. That was the case of *Diga* v. *Udai* (1) where the lambardars sued under Chapter X to resume a rent free grant. The Board of Revenue held that such a suit was maintainable by lambardars and also made certain observations as to the general powers of a lambardar. Mr. Agarwala, in his commentary on the N. W. P. Tenancy Act, discusses that ruling at page 155 and shows that the view taken by the Board of Revenue is incorrect. I agree with the remarks of the learned author. It has not been shown by reference to any of the provisions of the N. W. P. Tenancy Act or of the Land Revenue Act that a lambardar by the mere fact of being a lambardar can sue to eject a tenant without joining the other co-sharers, in a case in which the khata is joint. The case of *Bishambhar Nath* v. *Bhullo* (2) is also against the contention of the appellants. The appeal fails and is dismissed with costs."

Mr. *Nihal Chand* (with him Mr. *J. M. Banerji*), for the appellants:—

There is a difference in cases where a lambardar sues a tenant and cases where he sues a co-sharer for rent due to himself and his co-sharers, from some of the co-sharers. The case relied on by the single Judge, *Bishambhar Nath* v. *Bhullo* (2), was a case of latter description and does not apply. The lambardar is a representative of the whole community. The Land Revenue Act, section 4 (8) defines 'lambardar' to be a representative of the whole proprietary body. Section 164 entitles a co-sharer to sue the lambardar for share of his profits and get a decree on the gross rental if any portion has not been collected through the negligence of the lambardar. This implies that the lambardar is entitled to sue tenants for rent and consequently to apply for

(1) (1903) Select Decisions, No. 6. (2) (1911) I. L. R., 34 All., 99.

their ejectment if need be In any undivided khata he is the real landlord and can exercise the powers of distraint Section 120 of the Agra Tenancy Act lays down that distraint cannot be made by any person unless he is entitled to collect the whole rent All co sharers need not join in such proceedings but a lambardar is the person who can distrain Section 57 of the Rent Act 1882 also laid down the same law, *Ganga Sahai* v *Ganga Bakhsh* (1) The Board of Revenue have held that the lambardar is the manager of the common lands entitled to collect rents and do all necessary acts relating to the management of the estate for the common benefit, *Deepa* v *Udai Ram* (2) The lambardar is nominated by the co sharers under section 45 of the Land Revenue Act and he represents the whole body His acts are the acts of that body as he is the agent for them all He has to pay the Government revenue and divide the profits between the share holders How can he divide the profits unless he realizes rents and profits?

The Hon ble Dr *Tej Bahadur Sapru* for the respondent

The broad qustion is whether a lambardar can sue a tenant for ejectment without joining all the co-sharers in the suit The word lambardar is not defined in the Tenancy Act anywhere except in section 166 The word is used only in Chapter XI Section 164 gives a co sharer a right to bring a suit for profits against a lambardar The lambardar does not represent the co-sharers for all purposes He can do only what the Statute authorizes him to do Even if he can collect rents it does not follow that he can bring an action in ejectment Section 40 of the Tenancy Act speaks of a landholder bringing a suit for enhancement There must be an agreement between the landholder and the lambardar He is not entitled to collect rent otherwise than under the contract Among the conditions recorded by a settlement officer in the wajib-ul arz is also recorded an arrangement between the lambardar and co-sharer I do not dispute that a lambardar can do certain acts for his co-sharers, but how does his duty to collect and pay rent arise? I submit that he can only do so when he is specially authorized by the co-sharers under an agreement to that effect otherwise certain words in section 194

(1) Weekly Notes 1890 p 8 (2) (1903) Select Decisions, No 6

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would be superfluous. Sections 58 and 63 both use the word landholder, *Pramada Nath Roy* v. *Ramani Kanta Roy* (1).

RICHARDS, C. J., BANERJI and TUDBALL, JJ.—This appeal arises out of a suit brought by the lambardar against a tenant (purporting to be under the provisions of section 63 of the Tenancy Act) for ejectment. The court of first instance gave a decree. The lower appellate court held that the lambardar could not bring the suit without joining the other co-sharers and accordingly reversed the decree of the court of first instance. On second appeal to this Court a learned Judge took the same view as the lower appellate court and dismissed the appeal.

As the question is one of very considerable importance it has been fully argued before this Bench. The contention put forward on behalf of the respondent is as follows. That there are in this mahal a number of co-sharers and that accordingly under the provisions of section 194 of the Tenancy Act the suit cannot be maintained unless all the co-sharers join in the suit, and that the lambardar cannot be regarded as the agent appointed by them to act on their behalf. If this contention be sound, it would revolutionize the practice prevailing in lambardari villages in these provinces for generations. Indeed the learned advocate for the respondent felt himself bound to admit that the argument must necessarily go so far as to contend that the lambardar could not even give a valid discharge for the rent payable by a tenant so as to bind the other co-sharers.

'Lambardar' in the Tenancy Act is declared to have the same meaning as in the Land Revenue Act. In the Land Revenue Act the expression is defined to mean "a co-sharer of a mahal appointed under this Act to represent all or any of the co-sharers in that mahal." In lambardari villages in these provinces the duties of the lambardar are fairly well understood and recognized. Beyond all doubt he has the power of collecting rents. The following extract from a judgement of the Board of Revenue in our judgement fairly describes the position of the lambardar in a lambardari village:— "Speaking generally, the lambardar is the manager of the common lands entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do

(1) (1907) I. L. R., 35 Calc. 331.

all necessary acts relating to the management of the estates for the common benefit."

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It would be almost absurd to hold that the lambardar has power to collect the rents, and at the same time to hold that he had no power to enforce the collection. That he has power to collect rents is clearly shown by the provisions of section 164 which is as follows:—"A co-sharer may sue the lambardar for his share of the profits of the mahal or any part thereof. In such suit a court may award to the plaintiff not only the share of the profits actually collected but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant."

It will be seen from the provisions of this section that the lambardar is responsible to a co-sharer in a suit brought under the section for all rents which remained uncollected owing to his negligence. If the lambardar is entitled to collect the rents from the tenant, then he is a 'landholder' within the meaning of that expression in the Tenancy Act, and he accordingly would be entitled to bring a suit like the present.

We think that it is extremely improbable that section 194 was intended to apply to the case of a lambardari village. If, however, it does apply, in our opinion where the suit is brought by the lambardar in a lambardari village, strictly as lambardar, then the co-sharers must be deemed to have acted jointly through the person who is declared by law to be their representative.

Reliance has been placed upon the case of *Bishambhar Nath* v. *Bhullo* (1). That was a suit by the lambardar against a co-sharer for an excess of profits in which the other co-sharers were not joined for the profits payable to himself and other co-sharers. The case is not, therefore, similar to the present case, nor does it very clearly appear that the suit was a suit by the lambardar as such. We need express no opinion upon this case save to this extent that, if it was intended by the learned Judges to lay down as a matter of law that no suit can be brought by the lambardar in a lambardari village without joining all the other co-sharers, we cannot agree with the decision.

(1) (1911) I. L. R., 34 All. 93.

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The result is that we allow the appeal, set aside the decree of this Court and of the lower appellate court, and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number in the file and to proceed to hear and determine the same according to law.

Appeal allowed and cause remanded

APPELLATE CIVIL.

1914 *May, 2*

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott.

MATA PRASAD AND OTHERS (DEFENDANTS) v RAM CHARAN SAHU AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908) section 11—Res judicata—Benamidar—First suit against defendant alleging herself to be merely a benamidar, but found in that suit to be the real owner—Second suit by persons alleging themselves to be the real owners

A suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property She pleaded that she was not the real purchaser but was merely a benamidar for her three sons The court however declined to accept this plea and gave a decree against the defendant upon the record as being the real purchaser *Held* in a subsequent suit for possession of the same property brought by the sons that the previous decision did not operate as *res judicata* in respect of their claim

Khub Chand v *Narain* (1) *Nand Kishore Lal* v *Ahmad Ata* (2) *Yad Ram* v *Umrao Singh* (3), *Kaniz Fatima* v *Waliullah* (4) and *Gopinath Chaubey* v *Bhagwat Prasad* (5) referred to.

THE facts of this case were as follows —Baijnath and Jagannath, two brothers, were members of a joint Hindu family Baijnath obtained a simple money decree against one Ramjas Das on the 17th of June, 1878 In the year 1881 under a deed of partition between the brothers Jagannath also got a half share in the said decree Both the brothers applied for execution of the said decree, and in execution attached 16 annas of mauza Karma on the 20th of September, 1884 On the 27th of July, 1887, Ramjas Das executed a deed of simple mortgage in respect of an 8 anna share of mauza Karma to the defendants first party In the meantime both Jagannath and Baijnath died and on the

* First Appeal No 205 of 1913 from an order of Srish Chandra Basu, Additional Judge of Gorakhpur, dated the 9th of August 1913

(1) (1881) I. L R, 3 All, 812 (3) (1899) I L R, 21 All, 380

(2) (1895) I. L. R, 18 All., 69 (4) (1907) I L R, 0 All, 20

(5) (1884) I L. R, 10 Calc, 697 (705)

10th of January 1891 Ramjas Das executed a sale deed in respect of a 9 anna 6 pie share for Rs 9 471 in favour of Musammat Sheolagna wife of Jagannath who had also left three sons Ram Charan Tirbeni and Gauri Shankar Out of the consideration Rs 127 were paid in cash to the vendor and the balance was left with the vendee to pay off the amount of the decree dated the 17th of June 1878 held by the sons of Jagannath and Baijnath and also the amount of another decree held by the sons of Baijnath Mutation of names was effected in favour of Musammat Sheolagna The defendants first party brought a suit on the basis of the mortgage deed dated the 29th of July 1887 against Thakur Das heir of Ramjas Das the original mortgagor, and also against Musammat Sheolagna the purchaser of the 9 anna 6 pie share Musammat Sheolagna defended the suit raising amongst others the plea that she was not the owner of the sale deed dated the 16th of January 1891, that her sons *viz* Ram Charan Tirbeni and Gauri Shankar were the real owners and that they were necessary parties The Subordinate Judge found on the issue as to who was the real owner, that Musammat Sheolagna was the real owner and finding on the other issues also in favour of the then plaintiffs, passed a decree in favour of the plaintiffs on the 2nd of June 1893 In execution of that decree a six anna share which included 4 annas of the share purchased by Musammat Sheolagna was sold and purchased by the decree-holders who obtained possession on the 14th of April 1900 On the 16th of December 1911 Ram Charan Tirbeni and Gauri Shankar brought the present suit for possession of the 4 anna share of mauza Karma against the defendants first party on the ground that they were the real purchasers of the property under the sale deed of the 10th of January 1891 and that the decree against Musammat Sheolagna which was collusively obtained was not binding on them. The Subordinate Judge held that Musammat Sheolagna was the real owner and that even if she was a *benamidar* the decree against her was binding on the real owners (the plaintiffs) On appeal the Additional Judge reversed the findings on both the issues and remanded the case for trial on the merits The defendants first party appealed

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Dr. *Satish Chandra Banerji* (with him Munshi *Jang Bahadur Lal*) for the appellants, submitted that even on the finding of the Additional Judge that the plaintiffs were the real owners and that Musammat Sheolagna was merely a *benamidar*, the decree in the former suit was binding on the plaintiffs It has been consistently held by this and other High Courts that a decree in a suit brought by the *benamidar* binds the beneficial owner, *Nand Kishore Lal* v *Ahmad Ata* (1), *Gopi Nath Chobey* v *Bhugwat Pershad* (2), *Shangara* v *Krishnan* (3) and *Raiji Appaji Kulkarni* v *Mahadev Bapuji Kulkarni* (4) It makes no difference if the real owner's name is disclosed, *Yad Ram* v *Umrao Singh* (5) *Kaniz Fatima* v *Wali ullah* (6)

The Hon'ble Munshi *Gokul Prasad* (with him Mr *B E O Conor*) for the respondent, was not called upon, but he invited the attention of the Court to *Civa Rao Nanaji* v *Jevana Rau* (7).

MUHAMMAD RAFIQ and PIGGOTT JJ —This is an appeal from an order of the learned Additional District Judge of Gorakhpur, remanding the case under order XLI, rule 23, of the Code of Civil Procedure The circumstances which led to the making of that order are as follows —Baijnath and Jagannath were two brothers who were members of a joint Hindu family In 1878 a simple money decree was passed in favour of Baijnath against one Ramjas There was a partition among the two brothers, Baijnath and Jagannath, in 1881 when it was declared that Jagannath had also a share in the decree of 1878 Subsequent to the partition among the two brothers they applied jointly for the execution of the decree of 1878 against Ramjas In execution of that decree the entire village of Karma with some other property was attached on the 20th of September, 1884 During the continuance of that attachment and before the property was brought to sale, Ramjas executed a deed of mortgage in respect of 8 annas of village Karma in favour of the defendants, first

(1) (1895) I. L. R., 18 All., 69
(2) (1884) I. L. R., 10 Calc. 697 (705)
(3) (1891) I L R. 15 Mad., 267
(4) (1897) I. L. R., 22 Bom., 672.
(5) (1899) I. L. R., 21 All., 380
(6) (1907) I L R. 30 All., 30
(7) (1864) 2 Mad., H C Rep., 31

party On the 10th of January, 1891, while this attachment was still pending Ramjas executed a deed of sale in respect of 9 annas, 6 pies, of village Karma out of 16 annas in favour Musammat Sheolagna the mother of the sons of Jagannath The consideration of the sale deed consisted of the decretal amount due from Ramjas and Rs 127 cash Baijnath and Jagannath had died prior to the execution of the sale deed Rupees 127 were paid in cash to Ramjas and the remainder of the consideration was left in the hands of the vendee for payment of the decree of 1878 and another decree which Baijnath alone held against Ramjas In the early part of 1893 the defendants, first party, brought a suit on foot of their mortgage for recovery of the money due on it by sale of the mortgaged property. The suit was brought against the son of Ramjas, as Ramjas had already died, and also against Musammat Sheolagna She resisted the suit, principally on the ground that she was a *benamidar* and that the real purchasers under the sale deed of the 10th of January, 1891, were her sons who should be brought on the record as defendants in the case This allegation of hers was denied by the defendants, first party, who were plaintiffs in that case On their denial an issue was framed as to whether Musammat Sheolagna was a *benamidar* or not The learned Subordinate Judge who tried the case held that she was not a *benamidar* and on the merits of the case decreed the claim for recovery of the mortgage money by sale of the mortgaged property The defendants, first party, put their decree into execution and 6 annas of village Karma, which included admittedly 4 annas out of 9 anna 6 pie share conveyed by the deed of the 10th of January, 1891, were put up to auction and purchased by the plaintiffs decree-holders themselves They obtained possession through the court on the 14th of April, 1900 On the 16th of December, 1911, the sons of Jagannath, plaintiffs respondents in the present case, sued in the court of the Subordinate Judge of Gorakhpur for the recovery of possession of 4 annas out of 6 annas sold in execution of the decree of the 2nd of June 1893, on the allegation that they were the real purchasers under the deed of the 10th of January, 1891, and were not bound by the decree and sale in favour of the defendants, first party whose mortgage they challenged on several grounds. The

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defendants in the case objected to the suit on the ground, among others, of *res judicata*. The learned Subordinate Judge held that the claim was barred by the rule of *res judicata* and dismissed it. On appeal the learned Additional Judge took a different view and held that the rule of *res judicata* did not apply and remanded the case for trial on the merits. The point, therefore, in appeal before us, is whether the claim of the plaintiffs respondents is barred by *res judicata*. It is urged on behalf of the appellants that on the admitted statements of the plaintiffs respondents in their plaint their mother Musammat Sheolagna was a *benamidar* for them, and if she was a *benamidar* for the plaintiffs respondents a decree passed against her in that capacity is binding upon the plaintiffs also, if the parties in the present litigation are the same who were parties in the former litigation and the questions in issue were the same. In support of this view the learned advocate for the appellants relies on *Khub Chand* v. *Narain Singh* (1), *Nand Kishore Lal* v. *Ahmad Ata* (2), *Yad Ram* v. *Umrao Singh* (3) and *Kaniz Fatima* v. *Wali-ullah* (4). We do not think that the rule of *res judicata* is applicable to the circumstances of the present case. It appears to us that the rule has been made applicable in cases of decrees in favour of or against a *benamidar* where the real owner has allowed the dispute to be fought out between his *benamidar* and a third party and has abstained from coming forward. The principle upon which the rule has been applied to cases fought in the name of a *benamidar* is well expressed in *Gopi Nath Chobey* v. *Bhugwat Pershad* (5), where the learned Judges held that "the proper rule is that in the absence of any evidence to the contrary *it is to be presumed that the benamidar has instituted the suit* with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself". In other words, if the litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward he is bound by the decree. In the

(1) (1881) I. L. R., 3 All., 812.
(2) (1895) I. L. R., 18 All., 69.
(3) (1899) I. L. R., 21 All., 380.
(4) (1907) I. L. R., 30 All., 29
(5) (1884) I. L. R., 10 Calc., 697 (705)

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present case Musammat Sheolagna protested that she was a *benamidar* and she did not want to carry on the litigation which the defendants first party, brought against her, though not in her capacity as a *benamidar*, but wanted her sons to be brought on the record as defendants in the case. She gave information of the real state of the transaction of the 10th of January, 1891, to the defendants, first party who not only failed to take advantage of this information but contradicted it. It cannot, therefore, be said that the rule contended for by the learned advocate for the appellants is applicable to the circumstances of the present case. Moreover, the decree against Musammat Sheolagna was not passed as *benamidar* for her sons but on an express finding that she was the real owner and not a *benamidar* of her sons. The rule, therefore, that a decree against the *benamidar* binds the real owner does not hold good in the present case There is another consideration why the plea of *res judicata* should not be given effect to in this case. There were certain defences open to the present plaintiffs which were not open to their mother in the suit of 1893. In fact one of those defences was put forward by Musammat Sheolagna and formed the subject matter of the fourth issue. The learned Subordinate Judge overruled it by saying that she had no interest in the decree of 1878. We therefore, hold that the rule of *res judicata* does not bar the present suit and the order of the court below is a correct order. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Tudball.

1914 *May, 7.*

DURGA PRASAD PANDE AND ANOTHER (PLAINTIFFS) *v.* FATEH BAHADUR SINGH AND OTHERS (DEFENDANTS) *

Pre emption—Wajib ul-arz—Custom—Effect of confiscation of part of village—"Karibi wa khandani"

In a village comprising two eight anna thoks a custom of pre emption was recorded as prevailing in two wajib ul-arzes of 1833 and 1860 and in the *samina khewat* of 1884, the date of the last settlement *Held* that the custom so recorded was in no way modified by the fact that a four anna undivided share in the village had been confiscated by the Government after the mutiny and regranted to other proprietors *Held also* that a person related to a vendor through the female

* First Appeal No. 256 of 1913 from a decree of E E P. Rose, Additional Judge of Gorakhpur, dated the 11th of April, 1912

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line only and twelve degrees removed from him could not be considered as falling within the description in the wajib-ul-arz of *karabatdar khandani*.

THIS was a suit for pre-emption of certain property in a village called Khartam Sarai which had been sold on the 8th of November 1910 by Fateh Bahadur Singh to Pandit Govind Prasad a stranger to the village. The plaintiffs (Durga Prasad and Ganga Prasad) were co-sharers in the village owning a four anna share. There was a second suit for pre-emption brought by one Musammat Adhar Kunwar. Both suits were heard together, the plaintiffs being in each case made defendants in the other suit. The court of first instance dismissed the suit brought by Durga Prasad and Ganga Prasad and decreed the claim of Musammat Adhar Kunwari. The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Jang Bahadur Lal*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This and the connected Appeal No. 257 of 1912 arise out of two pre-emption suits brought by rival pre-emptors to secure property in the village of Khartam Sarai which was transferred by the defendant Fateh Bahadur Singh on the 8th of November, 1910, to the second defendant Pandit Govind Prasad.

The appellants in the present appeal are the plaintiffs, Durga Prasad Pande and Ganga Prasad Pande. Their case is that there is a custom of pre-emption prevailing in the village under which they have a right to pre-empt the property sold as against the vendee Pandit Govind Prasad who is an entire stranger to the village community. Musammat Adhar Kunwari, the plaintiff in the connected suit is a co-sharer also in the mahal. She also pleaded the existence of a custom of pre-emption and claimed that she had a right preferential to that of the other plaintiffs Durga Prasad and Ganga Prasad. Each set of plaintiffs was made a defendant to the other parties' suit.

The court below has dismissed the suit of Durga Prasad Pande and Ganga Prasad Pande on the ground that, though there is a custom of pre-emption existing in the village, it is a custom which is enforcible only among the co-sharers owning 12 annas out of 16 annas in the mahal, that therefore these plaintiffs have no right

whatever as they own the other 4 anna share and that Musammat Adhar Kunwari has a right to pre empt the whole It came to a conclusion as to the true sale consideration and gave Musammat Adhar Kunwari a decree for possession conditional on the payment of the amount fixed within a certain period Durga Prasad Pande and Ganga Prasad Pande have appealed in both cases The vendee Pandit Govind Prasad has not appealed against the decree passed in favour of Musammat Adhar Kunwari It is pleaded on behalf of the present appellants that the finding of the court below that a custom of pre emption does not extend to the owners of the 4 annas owned by these two appellants is incorrect, and that the evidence clearly shows that the custom applies to the whole village They accept the amount of consideration found to be correct by the court below and they plead that Musammat Adhar Kunwari has no right to pre-emption in preference to their own, but they as co sharers in the same thok with the vendor have a right preferential to her

In the year 1833 when a settlement was made in this village the whole village was owned by two branches of a family of Kayasthas In the wajib ul arz drawn up that year in clause 10 it was clearly set forth that a custom of pre emption existed in the village under which no co sharer could transfer to an outsider without first offering the property to the co-sharers of the village The village consisted of two thoks each of 8 annas One thok was owned by Bhaia Chitan Bakhsh and the other thok (Bakht Rai) by other members of the family whose property was in the hands of mortgagees Sarabjit Rai and others At the time of the mutiny owing to rebellion on the part of Banke Bihari Lal and another (two of the co sharers owning a 4 anna share in one of the thoks) Government confiscated their 4 anna undivided share The wajib ul arz of the settlement of 1860 shows that prior to that settlement Government had bestowed this confiscated 4 anna share upon one Ram Prokash Pande In the wajib ul arz at the commencement are entered the names of the four co-sharers who were members of the Kayastha family but in the opening preamble there is also mention made of Ram Prokash Pande and the fact of the grant to him by the Government In paragraph 7 the co sharers set forth that We Kunj Bihari Ram Prokash and

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Bhaia Suraj Bali Singh have been appointed lambardars by common consent In paragraph 16 the co sharers set forth the manner in which they collected the rents of the village In clause 6 is set forth the custom of pre-emption Under it if a co-sharer wishes to transfer his share, he was bound to offer it first of all to th co sharers of the village before making any such transfer The custom it would seem is exactly the same as set forth in the wajib ul arz of 1833 There cannot be any doubt whatsoever that Ram Prokash Pande was a co sharer at the time of that settlement and that he was a party to the settlement

We next come to what is known as the *zamima khewat* drawn up in the year 1884 (at the last settlement of the district) The 4 annas which had been granted to Ram Prokash Pande was at that time in the hands of his descendants In clause 2 of the *zamima khewat* is set forth a custom of pre-emption giving every co-sharer a right to transfer his share subject to the condition that the first right of purchase will vest in one who is a near co sharer and belongs to the family of the vendor, that the next right would vest in the co sharer in the patti and the third in the co sharers in other pattis It will be noticed that this custom is an amplification of the simple custom which was set out at the two former settlements It will also be noticed that it gives a prior right to a co-sharer who is a member of the same family as the vendor At this settlement the co parcenary body consisted of the Brahmans who owned a 4 anna share and the Kayasthas who owned the remaining 12 anna share The village still consists of two thoks of 8 annas each. The property which is the subject matter of this suit is in that 8 anna thok in which th Brahmans own a 4 anna share The share owned by Musammat Adhar Kunwari is in the other 8 anna thok in which the vendor has no share The court below has held, and the same plea has been maintained before us that by reason of th confiscation of the property of Chail Bihari Lal and Banke Bihari Lal the custom of pre-emption which was in existence prior to the confiscation no longer applied to the ownership of th 4 anna share and therefore when the Government granted this property to Ram Prokash Pande Ram Prokash had no right of pre-emption whatsoever under th custom in any portion of the remaining 12 anna share. In

the circumstances of the present case we do not think there is any force in this contention. In the year 1860 when Ram Prokash was a co-sharer in the village the custom was set forth in exactly the same manner as it had been in the year 1833. In the year 1884 when the custom was again set forth, but with considerably more detail, the Brahmans were still co-sharers in the village, and the fact that the prior right of pre-emption was given to the co-sharers of the same family is a strong indication that when that *zamima khewat* was dictated by the co-sharers, the latter contemplated that property owned by members of the Brahman family ought to be transferred and should go primarily to another member of that family. In the present case the vendor was a member of the Kayasth family whose property had never been confiscated and whose property was still within the custom. The Brahman pre-emptors are co-sharers in the village and they come well within the custom as set out in the wajib-ul-arz. In this view in our opinion the plaintiff's claim as against the vendee, who admittedly is an entire stranger, ought to have been decreed subject to the right of the rival pre-emptor.

In regard to the contest between the rival pre-emptors the question is, which, if either of them, has a prior right to pre-empt. Ganaga Prasad Pande and Durga Prasad Pande are co-sharers in same thok as the vendor. Musammat Adhar Kunwari, as noted already, is a co-sharer in the other thok. She claims preference on the ground that she is both "*karibi wa khandani*" with the vendor. She put forth her own pedigree, which is printed at page 20 of the respondent's book. Assuming it to be correct, on her own showing she is 12 degrees removed from the vendor, and such relationship as exists between them is through a female, the daughter of Lilji, the son of the common ancestor Kesri Singh. As ordinarily understood she could hardly be called a *khandani*, but even assuming that the word has been used loosely, it would be impossible to say that she was *karibi* being at least 12 degrees removed from the vendor. In our opinion she has failed to show that she has a preferential right, and as she is a co-sharer in another thok her rights are inferior to those of the appellants, Durga Prasad and Ganga Prasad.

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The result of the appeal will, therefore, be that the claim of Durga Prasad and Ganga Prasad Pande for possession of the property sold is decreed conditional on their paying the sum of Rs 6,066-7-0 into court within a period of three months from to-day's date. If they so deposit the money, they will recover their costs in all courts. On the other hand, if they fail to fulfil the condition their suit will stand dismissed with costs in all courts, and in case of their default Musammat Adhar Kunwari will have a further period of one month from the end of the period allowed to Ganga Prasad and Durga Prasad within which to deposit the sum of Rs 6,200, which sum she had offered to pay to the vendee, if she wishes to take the property. If she fails to pay within the time allowed, her suit will stand dismissed with costs in all courts. If she deposits the amount, then she will get her costs in the court below from the vendee.

Decree varied.

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May, 7

Before Sir Henry Richards Knight Chief Justice, and Mr Justice Tudball

MUHAMMAD AHSAN ULLAH AND OTHERS (DEFENDANTS) v. SHAMS-UN-NISSA BIBI (PLAINTIFF) AND KULSUM BIBI (DEFENDANT).*

Pre-emption—Pleadings—Alternative claims under custom and Muhammadan law

There is nothing to prevent a plaintiff in a suit for pre-emption basing his claim in the alternative, on contract, custom or Muhammadan law. But where there is an established custom of pre-emption and the pre-emptor fails to bring himself within that custom, he cannot fall back on the Muhammadan law. *Muhammad Salim* v. *Sadar ud-din Beg* (1) distinguished.

THIS was a suit for pre-emption. The plaintiff claimed to be entitled to pre-empt according to village custom as evidenced by the wajib-ul-arz and also stated that she had a right to pre-empt under the Muhammadan law and had fulfilled the requirements of that law. The court of first instance found that the plaintiff had failed to establish the existence of a custom of pre-emption, but that she had substantiated her claim under the Muhammadan law, and accordingly gave her a decree. The defendants appealed, contending that, as the plaintiff had set up a custom of pre-emption and at the same time claimed under the Muhammadan law, her suit must fail.

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* First Appeal No 120 of 1913 from an order of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 17th of January, 1913

(1) (1910) 7 A. L. J., 660.

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MUHAMMAD AHSAN UL LAH v. SHAMS UN NISSA BIBI

Dr *Satish Chandra Banerji*, The Hon'ble Dr *Tej Bahadur Sapru* and Dr *S. M. Suleman*, for the appellants.

Maulvi *Muhammad Ishaq* and Maulvi *Rahmat ul lah*, for the respondent.

RICHARDS, C J, and TUDBALL J —This appeal arises out of a suit for pre-emption The plaintiff in the plaint alleged that under the wajib-ul-arz there was a right to pre empt. There was also a reference made to the ordinary Muhammadan law of pre-emption In our opinion the reasonable and fair interpretation of the plaint was that the plaintiff based her claim alternatively under custom, contract or Muhammadan law An extract from the wajib-ul arz of 1881 was adduced in evidence If the entry in this document can be accepted as establishing the existence of a custom of pre-emption the plaintiff would be entitled to succeed If this document could not be accepted as establishing the existence of a custom of pre-emption it certainly was evidence of an agreement or arrangement between the co-sharers that during the period of the settlement a right of pre-emption should be recognized and enforced between them. The court below finding that there was no reference to pre-emption in an earlier wajib ul arz, and also that in the year 1840 the village belonged to a single proprietor, held that the existence of a custom was not established For some reason, not very clear, the court was also of opinion that there was no contract It went on to consider whether or not the plaintiff had a right under the Muhammadan law and had duly performed formalities thereby required. And this latter question the Court has found in favour of the plaintiff

If we accept the finding of the court below that the existence of a custom was not established, and were it necessary to do so, we should be disposed to hold that the plaintiff was entitled to succeed on the basis of the agreement evidenced by the extract from the wajib ul arz It seems to us that if it was not a record of an existing custom, it must be looked upon as the record of an agreement or arrangement between the co-sharers, and *primâ facie* at least binding upon them It must be noted that in the present case the mahal is permanently settled. If the wajib-ul arz truly records the agreement between the co-sharers, it would hold good at least until the next revision of records Even, however,

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MUHAMMAD AHSAN-UL-LAH v. SHAMS-UN-NISSA BIBI.

if we assume that there was no right of pre-emption based either on custom or agreement, we see no reason to differ from the view taken by the court below that the plaintiff had a right under the Muhammadan law and duly performed the formalities required by that law. It has been argued on behalf of the appellant that the plaintiff having set up a custom of pre-emption and at the same time claimed under the Muhammadan law her suit must fail, and reliance was placed on the case of *Muhammad Salim* v. *Sadar-ud-din Beg* (1). We have already stated that in our opinion the reasonable construction of the plaint in the present case is an alternative claim. The law allows a plaintiff to put his claim in the alternative. The only principle of law decided in the case cited is the principle that where in a mahal it is proved that a custom of pre-emption exists, then the Muhammadan law of pre-emption cannot prevail at the same time. So that where there is an established custom and the plaintiff pre-emptor fails to bring himself within that established custom, he cannot fall back on Muhammadan law.

The only other point taken was that the court below was wrong in the award of costs. In our opinion the plaintiff's case substantially succeeded, and we see no reason to vary the decree of the court below in this respect.

The objections filed on behalf of the respondents cannot be pressed.

The result is that we dismiss the appeal with costs. The objections are also dismissed with costs.

Appeal dismissed.

1914
May, 7.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott

WAHID KHAN AND ANOTHER (DEFENDANTS) v. ZAINAB BIBI (PLAINTIFF).*

Muhammadan law—Sunni sect—Divorce—Evidence—Burden of proof

No special form or formula is prescribed for a divorce under the Hanafia law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage.

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*Second Appeal No. 220 of 1913 from a decree of Srish Chandra Basu, Judge of the Court of Small Causes exercising the powers of a Subordinate Judge of Agra, dated the 6th of December, 1912, modifying a decree of Raja Ram, Munsif of Agra, dated the 29th of June, 1912.

(1) (1910) 7 A. L. J., 600

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WAHID KHAN v. ZAINAB BIBI

Where witnesses depose that a divorce was effected in their presence it is for the party alleging the contrary to prove by cross examination that the words used by the husband when pronouncing the divorce were insufficient and incomplete to support a valid divorce

THIS was a suit brought by a Muhammadan widow to recover her dower-debt and her legal share in the estate of her deceased husband, as also her wearing apparel or its value which she alleged was retained by the defendants The suit was brought against her two step-sons called Wahid Khan and Majid Khan She stated in her plaint that she was the second wife of Mehrab Khan, to whom she was married some six or seven years ago on a dower of Rs 500, and that she lived with him until his death which occurred on the 2nd of November, 1910 After his death her two step sons turned her out of the house, retaining all her personal goods and declining to give her any share in the estate of her deceased husband or to pay her dower debt The suit was resisted on various grounds It was urged in defence that the plaintiff was not the lawfully married wife of Mehrab Khan, but was his mistress, and that she herself had taken away articles worth Rs 1,000 from the house, when Mehrab Khan died The property in which she claimed a share was said to be the property of one of the sons of Mehrab Khan. The court of first instance decreed the claim in full. On appeal the learned Judge modified the decree as regards the claim to the legal share in the landed property. He held that the said property belonged to the defendant Wahid Khan. The defendants appealed to the High Court

Mr *S A. Haidar*, for the appellants

The Hon'ble Munshi *Gokul Prasad*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ —This appeal arises out of a suit brought by a Muhammadan widow to recover her dower-debt and legal share in the estate of her deceased husband, as also her wearing apparel or its value, which she alleged was retained by the defendants The suit was brought against her two step-sons called Wahid Khan and Majid Khan She stated in her plaint that she was the second wife of Mehrab Khan, to whom she was married some six or seven years ago on a dower of Rs 500, and that she lived with him until his death, which occurred on the 2nd of November, 1910 After his death her two step-

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v.
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to his native village and claimed enjoyment of his share in the joint property, disputes broke out between him and the descendants of Bhairo According to the plaintiff's case a deed of agreement was executed on the 20th of August, 1910, by the plaintiff, by Dwarka, son of Bhairo, and by Sheo Dulare, grandson of Sheo Sahai, by which arbitrators were appointed to divide the family property into three equal shares. The arbitrators in fact returned an award, dated the 7th of April, 1911, according to which the plaintiff would have received certain property specified by him in lists *(b)* and *(c)* appended to his plaint. The agreement of the 20th of August, 1910 was, however, defective in law, inasmuch as Dwarka had no authority to sign on behalf of his brother and nephew, even if it be granted that he had such authority on behalf of himself and his own sons and grandsons The plaintiff himself recognized this fact and framed his suit in the alternative He asked the Court either to give him possession of certain specified property, in accordance with the decision of the arbitrators, or in the alternative to put the whole of the property specified in list *(a)* appended to the plaint and described as joint property into hotchpot and divide it into three equal shares It is not altogether easy to say precisely what case the contesting defendants intended to set up in reply They admitted the correctness of paragraph 2 of the plaint, which recites that the plaintiff and the defendants are members of a joint Hindu family, and that no formal partition was effected prior to the 7th of April, 1911 They went on to plead, however, that there had actually been a division of the property many years ago between Sheo Tahal, Sheo Sahai and Bhairo in their life time. With regard to the property specified in list *(a)*, I understand their contention to be that part of it was their own self acquired property, while the other portion of it was in the possession of the different members of the family in accordance with the division effected between Sheo Tahal, Bhairo and Sheo Sahai Thus they contended that there was no joint family property left capable of partition The courts below have arrived at very different conclusions regarding the facts of the case, but it is the findings of the learned Subordinate Judge which are binding on me in second appeal He has in effect found the whole of the properties specified in list *(a)* appended to the plaint to be the joint property of the parties and has given the plaintiff a decree for possession by partition of a one-third share in the whole of the said properties Seeing that the decree is wholly silent as to the manner in which this partition is to be effected, and that even if it could be interpreted as giving the plaintiff a one-third share in each single property, there are items in which it will be necessary to effect a division by metes and bounds, I can only treat the decree of the lower appellate court as a preliminary decree for partition, declaring the rights of the parties, within the meaning of order XX, rule 18 of the Code of Civil Procedure.

In second appeal to this Court the contesting defendants seek in one way or another to disturb the finding arrived at by the lower appellate court as to the nature of the property specified in list *(a)* aforesaid and as to the rights of the plaintiff therein. In view of the admissions contained in the written statement of the contesting defendants I do not think that it can be said that the court below has misplaced the burden of proof on the defendants regarding the division of the property many years prior to the institution of the suit There has been

a difference between the two courts below regarding the execution of the agreement of the 20th of August 1910, but I must take it from the lower appellate court that Dwarka and Sheo Dulare executed this document with knowledge of its contents. It is contended before me that the learned Subordinate Judge should not have treated any statement of Dwarka's in this document as binding on the rest of the contesting defendants I do not think it is a case of using the statements in a document as admissions The fact that Dwarka and Sheo Dulare have signed this document agreeing to a partition and recognising the rights of the plaintiff Ram Pat was a circumstance in the case a piece of evidence in fact which the court below was entitled to take into consideration when coming to a finding as to the truth or otherwise of the contention set up by the defendants I cannot see my way to disturb the finding of fact arrived at by the lower appellate court

There remains however one point for consideration which was raised for the first time in this Court The property specified in list *(a)* appended to the plaint includes besides certain zamindari property certain *sir* and *khud kasht* lands certain trees and houses a cultivatory holding of 10 bighas 7 biswas rented at Rs 69 8-0 The point now taken on behalf of the defendants appellants is that the present suit in so far as it is a suit for partition of this particular item of property offends against the provisions of section 32 of the Agra Tenancy Act and was therefore not entertainable in either of the courts below The suit as it stands was one for partition of the joint family property and was certainly maintainable as a whole in the court in which it was instituted. Moreover the plaintiff was bound to bring the whole of the joint family property into hotchpot and if he had excluded this cultivatory holding it would have been made ground of objection and might have brought about the dismissal of the suit altogether Certainly the court below cannot in view of the provisions of section 32 aforesaid divide this holding or apportion its rent All that the court has done is to declare that the plaintiff is entitled to a one third share in the sum total of the property specified in list *(a)* The court may yet divide the property as a whole into three equal shares without dividing the cultivatory holding by metes and bounds or failing this, it may declare the plaintiff's right to a one third share as was done in the case of *Ashiq Husain* v *Asghari Begam* (1)

I do not think the decree of the lower appellate court can be successfully assailed on the ground now taken I dismiss the appeal with costs'

The defendants appealed

Munshi *Haribans Sahai*, for the appellants

Babu *Purushottam Das Tandan* for the respondent

RICHARDS C J and TUDBALL J —The first point taken in this Letters Patent appeal is that the decree of the court below which was affirmed by this Court is not a decree for partition In our opinion the decree can be read as a preliminary decree for partition It was so interpreted by the learned Judge of this

(1) (1907) I L. R., 30 All., 90

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DWARKA v. RAM LAT

Court and we have not the least doubt that when the case goes back to the court below it will act accordingly

The next point argued was that amongst the items of property is an occupancy holding and that under section 32 of the Tenancy Act no suit can be brought for the division of an occupancy holding This matter is in our opinion also covered by the judgement of the learned Judge of this Court There can be no doubt that a suit for partition of property can be brought even if the family property includes an occupancy holding It does not at all follow that the court must necessarily sub-divide the holding in contravention of the provisions of the Tenancy Act The Court can either give the occupancy holding to one party taking from that party an equivalent in value or if it be found impossible to do this the Court can leave the occupancy holding undivided merely making a declaration that the parties are entitled jointly to the holding In our opinion there is no force whatever in the appeal It is accordingly dismissed with costs

Appeal dismissed

1914 *May* 8.

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

RAM SARUP SAHU (DEFENDANT) v KARAM ULLAH KHAN AND ANOTHER (PLAINTIFFS) *

Pre-emption—Dispute as to true sale consideration—Evidence—Burden of proof—Payment before Sub Registrar

In a suit for pre-emption where it is alleged that the sale price is fictitious and put into the deed for the purpose of defeating pre-emption it is open to the pre emptor to give evidence to show that the market price is far below that stated in the sale deed If he gives such evidence to the satisfaction of the Court, the latter is quite justified in arriving at its own conclusion as to what was the real consideration and this notwithstanding that it is proved that the amount stated in the deed was paid before the Sub Registrar - *Abdul Majid* v *Amolak* (1) referred to *O Conor* v *Ghulam Haidar* (2) not followed

THIS was a suit for pre emption and the only material question in the case was as to the amount of the consideration for the sale According to the sale deed this was Rs 399, but evidence was given to show that the market value put at its very highest would

* Second Appeal No 121 of 1913 from a decree of E E P Rose Additional District Judge of Gorakhpur, dated the 20th of September, 1912 modifying a decree of Ali Muhammad Munsif of Basti dated the 14th of June, 1912

(1) (1907) I L R, 29 All, 613 (2) (1906) I L R., 28 All., 617

not amount to more than Rs 200 The court of first instance decreed the claim for Rs 399 On appeal, however, this decree was modified and the pre emptive price reduced to Rs 200 The defendant vendee appealed to the High Court, and it was contended that as Rs 399 were actually paid before the Sub Registrar, and there was no evidence that any part of this sum was handed back to the purchaser, the court was bound to presume that this was the true consideration for the sale —

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RAM SARUP SAHU v. KARAM ULLAH KHAN

Munshi *Haribans Sahai* for the appellant

Maulvi *Muhammad Ishaq* for the respondents

RICHARDS C J, and TUDBALL J —The only question in this appeal is that of consideration The consideration according to the sale deed was Rs 399 Evidence was given in the court below to show that the market value put at the very highest would not amount to Rs 200 So far as the finding of the lower appellate court is a finding of fact as to the consideration it is binding upon us in second appeal It is argued however on behalf of the appellant that as Rs 399 was actually paid before the Sub Registrar and inasmuch as there was no evidence that any of this sum was given back, the court was bound to hold that that was the true consideration Reliance is placed upon the case of *O Conor* v *Ghulam Haidar* (1) This ruling is in our opinion contrary to a series of rulings of this High Court and was expressly dissented from in the case of *Abdul Majid* v *Amolak and Ranji Lal* (2) In our opinion when it is alleged that the sale price is fictitious and put into the deed for the purpose of defeating pre emption it is open to the pre emptor to give evidence to show that the market price is far below that stated in the sale-deed If he gives such evidence to the satisfaction of the court the latter is quite justified in arriving at its own conclusion as to what is the real consideration and this notwithstanding that it is proved that the amount stated in the deed was paid before the Sub Registrar It is of course open to the vendee to show that there were special circumstances why he was ready to give and did give the actual price mentioned in the deed We dismiss the appeal with costs

Appeal dismissed

(1) (1906) I L R 29 All 617 (2) (1907) I L R, 29 All, 618

1914
May 13

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

SALIM UN NISSA (APPLICANT) v SAADAT HUSAIN AND ANOTHER (OPPOSITE PARTY) *

Muhammadan law—Shia sect—Guardian and minor—Right to guardianship of female minor

According to the Muhammadan law applicable to the Shia sect the right to the guardianship of a female minor rests primarily with the mother on her death with the father, and only on the death of the father does the right pass to the maternal grandmother and other ascendants

THE facts of this case were briefly as follows —

A Muhammadan lady belonging to the Shia sect died leaving a minor girl about 3½ years old Her mother applied to be appointed guardian of the person and property of the minor The grandfather and the father of the child opposed the application, but the District Judge appointed the maternal grandmother to be guardian of the person of the child. The father and the grandfather appealed to the High Court where it was urged that the father had a preferential right to be appointed guardian excluding the maternal grandmother

Mr *Agha Haidar*, for the appellants submitted that the court below was wrong in applying the Sunni law to the parties, who were Shias The Shia law differs from the Sunni law, and among the Shias in the absence of the mother the father is the proper guardian Failing him come the grandmother and other ascendants, Baillie's Imamia Law, Ameer Ali, Vol 2, page 294 (3rd edition), Tyabjee s Muhammadan Law, sec 242

Maulvi *Shafi-uz zaman* for the respondents submitted that although among the Shias the father has a preferential right, in this case he did not apply to be appointed guardian, and it was only in this Court that he set up his preferential right The court has to look to all the circumstances of the case when appointing a guardian for a Muhammadan child, Wilson page 195 The grandmother only wanted to be appointed guardian of the person of the girl and not of her property She will maintain the child with her own money and it is for the welfare of the minor to appoint the lady as her guardian The father is a young man of 25 and may marry again

* First Appeal No 35 of 1914 from an order of Muhammad Ali District Judge of Moradabad dated the 7th of November 1913

1914

SALIM UN NISSA v. SAADAT HUSAIN

MUHAMMAD RAFIQ and PIGGOTT, JJ —The point raised in this appeal relates to the guardianship of a minor Shia girl, about 3½ years old, whose mother died on the 25th of August 1913 The maternal grandmother of the minor applied to the court below to be appointed guardian of her person and property The application was opposed by the father and paternal grandfather of the minor The father did not apply to act as guardian of the minor, but supported the application of his own father The learned District Judge appointed the maternal grandmother as guardian of the person of the minor The question as to the guardianship of the minor's property was given up by the applicant The father and the paternal grandfather of the minor have come up in appeal to this Court and contend that the order of the court below is bad under the law It is said that under the Shia law, to which the parties are subject on the death of the mother or her disqualification for any reason the next person entitled to the guardianship of a minor child is its father It has been pointed out to us that the Shia law on this subject differs from the Sunni law The contention for the appellants is borne out by the books on Shia law to one of which we may refer here Mr Ameer Ali in his book on Muhammadan Law Vol II 3rd edition page 294 says as follows —'The Shias are in agreement with the Sunnis with regard to the general principles governing the right of *hizanat* But among them, in the absence of the mother, the right passes to to the father, and failing him to the grandparents and other ascendants" The maternal grandmother had therefore no right to claim to act as guardian of the minor girl when her father was alive The appeal prevails and is allowed We set aside the order of the court below and dismiss the application of Musammat Salim un nissa. Costs are allowed to the appellants

Appeal decreed

1914
May, 18

REVISIONAL CRIMINAL

Before Justice Sir George Knox

BAL KISHAN *v.* SIPAHI LAL AND OTHERS*

Criminal Procedure Code section 17—District Magistrate—Powers of Magistrate of the district as regards distribution of criminal work—Delegation

Held that section 17 of the Code of Criminal Procedure does not empower a district magistrate to delegate to the senior honorary magistrate of the district the duty of distributing cases for disposal amongst the other honorary magistrates and benches

THIS was a case called for by the High Court on perusal of the quarterly statement of the Pilibhit district The case was instituted in the court of Pandit Bishambhar Nath He transferred it to a bench of honorary magistrates On the 17th of April, 1913, the case seems to have come before Raja Lalta Prasad where it remained until the 17th of May, 1913 From his court it then went to a bench of magistrates, but apparently without any formal order transferring the case On being called upon by the High Court for an explanation as to the various transfers the District Magistrate explained that the case had been transferred to the court of Raja Lalta Prasad by the senior honorary magistrate Shaikh Abdul Rahman "who has been authorized to distribute cases among the honorary magistrates," and that as Raja Lalta Prasad had gone on leave the case had been taken up by the remaining member of the bench and thereafter transferred to a bench of magistrates by order of Pandit Bisheshar Nath Kak in the capacity of sub divisional magistrate

KNOX J —The case was one in which the offence charged was an offence under section 323 of the Indian Penal Code It was transferred from one court to another until it had come under the cognizance of no less than four different courts and even now it does not appear clear under what orders the case passed from one to another of these several courts There appears to be a custom in Pilibhit under which all cases entrusted to a bench of magistrates are put before the senior honorary magistrate in order that he may make a proper distribution of the work and the authority for this practice is based upon section 17 of the Code of Criminal Procedure. Section 17 empowers a

* Criminal Revision No 1032 of 1913

1914

BAL KISHAN v SIPAHI LAL

District Magistrate to make rules or give special orders consistent with the Code as to the distribution of work among such magistrates and benches Now distribution of work is one thing calling up a case from the court to which it is transferred for trial is quite different and I cannot find that the Code anywhere empowers the district magistrate to pass on his powers of calling up cases from subordinate courts and redistributing them Such a practice even if governed by a special order, would not appear to be consistent with the Code and the mischief from such a practice appears when a simple case of this kind is handed about from court to court

The distribution of business is, so far as I can ascertain, confined to district magistrates and cannot be exercised by a magistrate in charge of a sub-division

The order of the magistrate directing that the senior honorary magistrate should distribute work among the other honorary magistrates is an order *ultra vires* and some other arrangement for distribution of work than this should be made; otherwise there is a risk of a case transferred by a senior honorary magistrate being declared null and void *ab initio*, being a trial without jurisdiction Let the record be returned

Record returned

APPELLATE CIVIL

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1914 *May*, 13

MATA PRASAD (APPLICANT) v BARAN BARHAI (OPPOSITE PARTY)*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal

Held that when sanction to prosecute has been granted or refused by a court under the provisions of section 195 of the Code of Criminal Procedure only one appeal from such order will lie under that section *Kanhai Lal v Chhadammi Lal* (1) followed *Muthuswami Mudali v Veeni Chetti* (2) referred to

ONE Mata Prasad applied in the court of the Munsif of Gorakhpur for sanction to prosecute Baran Barhai, but sanction was refused He then made a further application under clause

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* First Appeal No 6 of 1914 from an order of W R G Moir, District Judge of Gorakhpur dated the 17th of November, 1913

(1) (1908) I L R, 31 All 48 (2) (1907) I L R, 30 Mad, 382

1914

MATA PRASAD v. BARAN BARAI

(6) of section 195 of the Code of Criminal Procedure to the District Judge who granted the sanction asked for. Baran Barhai appealed against this order to the High Court.

Munshi *Jang Bahadur Lal*, for the respondent, raised a preliminary objection. There was no appeal against the appellate order granting sanction. This was decided in the case of *Kanhai Lal* v. *Chhadammi Lal*, (1)

Babu *Piari Lal Banerji*, for the appellant:—

In the present case this Court is being asked to revoke a sanction which has been granted and under the terms of section 195, Criminal Procedure Code. This is permissible. It is not the case of the High Court being asked to interfere with the order of a superior court *upholding* sanction. The upholding of such sanction would not be equivalent to the granting of sanction and consequently there would not be under the terms of section 195, clause (6), any further remedy. The practice of this court not to allow a second appeal must be confined to cases in which the same party, who had availed himself of a right of first appeal and failed claimed a further right of appeal. It could not apply to the case of a person who for the first time claimed the right of appeal given to him against the order granting sanction. The case reported in I. L. R. 31 All. 48 purports to follow the opinion of WALLIS J. in *Muthuswami Mudali* v. *Veeni Chetti* (2). But the opinion of WALLIS, J., was confined to the case of sanction being upheld by the appellate court and the party against whom it is granted claiming a further right of appeal. The case of *King Emperor* v. *Serh Mal* (3) which is referred to in I. L. R., 31 All. 43, was also a case in which the first court had granted sanction and the appellate court upheld it. It could not be said that there was a practice of this Court not to allow an appeal under the circumstances of the present case.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—These are three connected first appeals which raise substantially one single point. An application under section 195 of the Code of Criminal Procedure for the grant of sanction to institute certain prosecutions for the offence of giving false evidence under section 193

(1) (1908) I. L. R. 31 All. 48. (2) (1907) I. L. R., 30 Mad., 382.

(3) Weekly Notes 1908 102.

of the Indian Penal Code was made in the court of the Munsif of Gorakhpur city and was dismissed by him The party applying for sanction carried the matter to the court of the District Judge as he was entitled to do under clause (6) section 195, of the Code of Criminal Procedure with the result that the District Judge passed an order granting the sanction The parties against whom the sanction was granted have filed these three connected appeals in this Court A preliminary objection is taken that under the provisions of section 195 of the Code of Criminal Procedure aforesaid it was not intended that the question of granting or withholding a sanction should be carried to a third court There is clear authority of a bench of this Court in support of this objection in the case of *Kanhai Lal* v *Chhadammi Lal* (1) where the facts were precisely similar to those of the case now before us We have been asked to reconsider this ruling both with reference to the decision of a Full Bench of the Madras High Court in *Muthuswami Mudali* v *Veeni Chetti* (2) and to other cases referred to in the abovementioned ruling of this Court So far as we are aware the reported decision of this Court has never been dissented from and has been accepted in this Court for the last five or six years On the principle of *stare decisis* we do not think it expedient to reconsider that decision or the arguments on which it was based We hold accordingly that no appeal lies to this Court against the orders complained of and we dismiss each of the three appeals now before us with costs

1914

MATA PRASAD v BABAN BARHAL

Appeal dismissed

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball.

1914 May 13

FAZAL HUSAIN (PLAINTIFF) v MUHAMMAD SHARIF AND ANOTHER (DEFENDANTS) *

Pre-emption—Wajib-ul arz—Custom—Evidence—Entry in wajib-ul-arz clear and unrebutted

Where there is an entry in the wajib ul arz as to the right of pre emption which is clear and distinct and there is no evidence to the contrary the court

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* Second Appeal No 603 of 1913 from a decree of Durga Dat Joshi District Judge of Azamgarh dated the 4th of March 1913 confirming a decree of Udit Narain Sinha Subordinate Judge of Azamgarh dated the 18th of November 1912

(1) (1908) I L R 31 All., 43 (2) (1907) I. L. R., 30 Mad., 382

1914

FAZAL HUSAIN v MUHAMMAD SHARIF

ought having regard to the prevailing practice, to hold that the custom of pre emption exists *Returaji Dubain* v *Pahlwan Bhagat* (1) referred to *Dhian Kunwar* v *Diwan Singh* (2) distinguished

THIS was a suit for pre-emption based on village custom in proof of which the plaintiff relied on an entry in the wajib ul arz of 1861 supported by a judgement of the year 1866 There was no evidence to displace the effect of the entry in the wajib ul arz The court of first instance however, did not consider the evidence adduced by the plaintiff to be sufficient and dismissed the suit, and on appeal this decree was upheld The plaintiff thereupon appealed to the High Court

Maulvi *Muhammad Ishaq* for the appellant

Dr *Surendra Nath Sen* for the respondents

RICHARDS C J and TUDBALL J —This appeal arises out of a suit for pre emption The plaintiff adduced in evidence in support of the existence of this custom an extract from the wajib-ul arz of 1861 He also produced a judgement of 1866 which shows that the right of pre emption was at least asserted and that the pre emptor got possession though possibly on a compromise decree Both the courts below have dismissed the plaintiff's claim The question for us to decide is whether or not the evidence which the plaintiff adduced was sufficient in the absence of all evidence to the contrary to establish the custom under which he claimed In the full Bench case of *Returaji Dubain* v *Pahlwan Bhagat* (1) it was decided that the entry in the wajib-ul arz of a right of pre emption was to be taken *primâ facie* as a record of a custom rather than of a contract and that the mere fact that at the beginning of the wajib ul arz or at the end a word such as '*ikrarnama*' appears is not sufficient to make the entry an entry of a contract and not of a custom Almost every wajib ul arz does contain certain matters which are arrangements between the co sharers Nor is the mere fact that there are entries of arrangements in the wajib ul arz sufficient to prevent the entry of pre-emption from being read as a record of custom In the courts below and in this Court the case of *Dhian Kunwar* v *Diwan Singh* (2) was quoted and relied upon on behalf of the defendants In that case the only evidence adduced on behalf of the plaintiff was an extract from one wajib ul arz

(1) 1911) I L R 33 All., 196 (2) (1911) 8 A. L J 786

1914

FAZAL HUSAIN v. MUHAMMAD SHARIF.

The lower appellate court had dismissed the plaintiff's claim and this court affirmed its decree. If the case is carefully looked into, it will be seen that the case was entirely decided upon its own facts and circumstances. The wajib-ul-arz was of an unusual nature, and in the very same clause in which reference to pre-emption was made, reference was made to a number of other matters which could not possibly have been matters of custom. Furthermore, the plaintiff in his plaint had referred to an earlier wajib-ul-arz but had not filed it. The case was decided, as we have said, on its own facts and circumstances. In the present case the record is quite clear and free from ambiguity, nevertheless the case might have been quite different if the defendants had gone into evidence and had shown, from the history of the village or other circumstances, that it was very improbable or impossible that a custom of pre-emption had grown up in the village. They might have shown (if such was the case) that there had been a number of sales to strangers, or that the entry of the right of pre emption in different wajib-ul-arzes were necessarily inconsistent. If the defendants had gone into any such evidence the court might very well have come to the conclusion that the entry in one wajib-ul-arz standing alone was insufficient to support the allegation of the existence of the custom, but where there is an entry in the wajib-ul-arz which is clear and distinct, and there is no evidence to the contrary, we think the court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. The result is that we must allow the appeal, set aside the decrees of the courts below and remand the suit to the court of first instance, through the lower appellate court, with directions to re-admit it under its original number and to proceed to hear and determine the case according to law. Costs here and heretofore will be costs in the cause.

Appeal allowed.

REVISIONAL CRIMINAL.

1914
May 14.

Before Mr. Justice Piggott

EMPEROR *v* RAM SARUP AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), section 447—Criminal trespass—One co sharer building on common land without the consent of the other co sharer.

Where one co sharer built upon a piece of common land against the will of the other co-sharer, whose consent had been previously asked and had been refused, it was *held* that this circumstance alone was not sufficient to render the co- sharer so building guilty of criminal trespass *In the matter of the petition of Gulab Prasad* (1) and *Emperor* v *Lakshman Raghunath* (2) referred to

ONE Ram Rijpal, who was a co sharer with Umrao Mirza in certain land in the village of Aslatpur, wishing to build a house upon a portion of the common land, asked the permission of Umrao Mirza to do so. Umrao Mirza refused his consent, but notwithstanding this Ram Rijpal a short time afterwards proceeded to erect some sort of a house upon the land in question. In respect of this building Ram Rijpal and others were prosecuted and convicted of criminal trespass under section 447 of the Indian Penal Code. They appealed, but their appeals were summarily dismissed. They thereupon filed the present application in revision in the High Court.

Mr. *M. L. Agarwala*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J.—This is an application in revision against an order of the District Magistrate of Meerut, dismissing the appeals of Ram Sarup, Mutasaddi Lal and Ram Rijpal who have been convicted of an offence under section 447, Indian Penal Code, and sentenced to a fine. The case was tried by a magistrate of the third class. His judgement contains a complete statement of the facts of the case and the evidence given by various witnesses, but makes no reference throughout to the definition of "criminal trespass" as given in the Indian Penal Code. There is therefore no finding recorded as to whether the conviction in this case is for having entered on property in possession of the complainant Umrao Mirza with intent to commit an offence, or with intent to

* Criminal Revision No 230 of 1914, from an order of G K Darling, Joint Magistrate of Meerut, dated the 27th of October 1913

(1) (1879) I L R, 2 All, 465. (2) (1902) I L R, 26 Bom, 558

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Emperor v. Ram Sarup

intimidate, insult or annoy the said Umrao Mirza The case for the prosecution is thus stated by the magistrate at the very commencement of his judgement —That in the village of Ashtpur plot No 12 owned and possessed by the complainant and other co-sharers was lying waste, that the accused Ram Rijpal paid a visit to the complainant and asked his permission to build a house on the said land which permission was flatly refused; that the complainant subsequently came to know that the three accused had built four walls on a portion of plot No 12 aforesaid, put grass thatch on them and had commenced to tie their cattle therein and to live there themselves I think I may infer from the judgement that these are the facts which the magistrate held to be proved The District Magistrate on appeal was expressly invited to consider the question whether the conviction was justified either on the evidence or in law on the facts found. He dismissed the appeal summarily without giving any reasons. So far as I can gather, the plot of waste land in question was one which might have been entered upon by any one of the accused, in the sense that they could have walked across it in pursuance of their daily avocation without the complainant's being entitled to raise any objection If the conviction therefore can be maintained at all it must be upon a finding that, when the three accused began to build the walls the subject matter of the complaint, they were unlawfully remaining on this land with some such intent as would render them liable to punishment

The only intent which could reasonably be argued against them would be an intent to annoy Umrao Mirza I have been referred to one or two cases on the point, the first being the well known authority of this Court, *In the matter of the petition of Gobind Prasad* (1), and the other being a decision of the Bombay High Court in *Emperor v. Lakshman Raghunath* (2) It must be noted that the accused Ram Rijpal is himself a co-sharer in the village, and his asking another co-sharer to consent to his appropriating to his own use a portion of a plot of waste land would not necessarily imply that the co-sharer whose consent he asked was admitted by him to be the sole owner of the plot in question On the facts of the case and in

(1) (1879) I L R, 2 All, 465 (2) (190-) I L R, -6 Bom 650

1914

EMPEROR v. RAM SARUP

view of the authorities I do not think that the mere fact that Umrao Mirza had intimated to Ram Rupal that he would object to the latter's building upon any portion of that land is sufficient to warrant a conclusion that the accused were acting unlawfully when they remained on his plot of land in order to set up enclosure walls, or that their intention was to annoy Umrao Mirza Accepting this application I set aside the conviction and the sentence in the case The fine, if paid will be refunded

Conviction set aside

APPELLATE CIVIL

1914
May 15

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

BHAGWATI SARAN MAN TIWARI (PLAINTIFF) v PARMESHAR DAS AND OTHERS (DEFENDANTS) *

Pre emption — Practice — Alternative claims — Claim for possession as owner joined with alternative claim for pre emption

There is nothing in law to prevent a plaintiff in a suit for pre emption also setting up a claim for posession of the property as owner and his suit ought not to be dismissed on the ground that he has put his case in the alternative

THE facts of this case were as follows —

One Janki Saran the father of the plaintiff, purchased a certain share in the village from one Musammat Moti Rani a Hindu widow A further share was acquired by Janki Saran by auction purchase in a sale in execution of a decree against the same Musammat Moti Rani After the death of Moti Rani a person claiming to be the reversioner (Dwarka Das) sold the property to one Parmeshar ignoring the sale by the widow and the auction sale in execution of the decree Then the plaintiff instituted the present suit, claiming first a declaration that he was entitled to possession by virtue of the sale by Moti Rani and the auction purchase and secondly to pre empt the property by virtue of a custom of pre emption

The court of first instance dismissed the plaintiff's suit on the sole ground that the plaintiff could not maintain the suit for pre emption because he claimed a right of possession as full owner

The plaintiff appealed to the High Court

Munshi *Haribans Sahai*, for the appellant

* First Appeal No 356 of 1913 from a decree of Srish Chandra Basu Additional Judge of Gorakhpur dated the 6th of August 1913

Munshi *Iswar Saran* and Munshi *Benode Bihari*, for the respondents

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BHAGWATI SARAN MAN TIWARI v. PARMESHAR DAS

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre emption. It appears that Janki Saran, the father of the plaintiff, purchased a certain share in the village from one Musammat Moti Rani, a Hindu widow. A further share was acquired by Janki Saran by auction purchase in a sale in execution of a decree against the same Musammat Moti Rani. After the death of Moti Rani a person claiming to be the reversioner (Dwarka Das) sold the property to one Parmeshar ignoring the sale by the widow and the auction sale in execution of the decree. Then the plaintiff instituted the present suit, claiming, first, a declaration that he was entitled to possession by virtue of the sale by Moti Rani and the auction purchase and, secondly, to pre-empt the property by virtue of a custom of pre emption. Janki Saran is the father of the plaintiff and they apparently are members of a joint Hindu family. Another suit for pre-emption was brought by Sheobaran alleging himself to be a co sharer having a right of pre emption under the custom Each of the two pre-emptors was made a defendant to the suit by his rival. In the meanwhile Parmeshar Das brought a suit for possession of the property against Janki Saran and his sons, and that suit has been decreed But the question of pre emption was not decided.

The court below has dismissed the plaintiff's suit on the sole ground that the plaintiff cannot maintain the suit for pre-emption because he claimed a right of possession as full owner.

In our opinion this decision was wrong. There was no reason why the plaintiff should not put his case in the alternative. Had he not done so, it might strongly be urged that he was bound to put forward every ground of attack available. In *Gandharp Singh* v. *Sahib Singh* (1) a sale was made to certain members of a joint Hindu family some of whom were not recorded as co-sharers. A suit for pre emption was brought by a person claiming to be a co-sharer who alleged that the vendees were strangers A full Bench held that the vendors (being members of a joint Hindu family, which joint Hindu family was entitled

(1) (1884) I. L. R., 7 All., 184

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BHAGWATI SARAN MAN TIWARI v. PARMESHAR DAS

to a share in the village) must be regarded as co sharers, and not as strangers, and the suit of the plaintiff was dismissed. In the present case it is admitted that the family to which the plaintiff belongs owned a three anna share. Consequently, if we apply the principle laid down in the case referred to above, the plaintiff is a co-sharer, and would be entitled to pre-empt the property, provided that no one else has a prefential right. If his right of pre-emption is equal, he would be entitled to a decree in part. All these matters must be decided by the court below. We accordingly set aside the decree of the learned Additional District Judge and remand the case with directions to re-admit the appeal and proceed to hear and determine the same according to law, having regard to what we have stated above. The costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

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May, 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball

BABBU AND ANOTHER (DEFENDANTS) *v.* SITA RAM (PLAINTIFF) AND DRIG PAL SINGH AND OTHERS (DEFENDANTS) *

Mortgage—Consideration—Recital in mortgage deed of receipt of consideration—Evidence—Burden of proof.

Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *primâ facie* evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The mere fact that a court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendants from producing evidence that, notwithstanding the acknowledgment in the body of the deed, there was no consideration in fact.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court The facts of the case appear from the judgement under appeal, which was as follows :—

"This was a suit for sale upon a mortgage made on the 23rd of September, 1898, by the defendants Drigpal Singh and Bhagwan Singh in favour of the plaintiff and the defendant Manni Lal The fifth defendant is a subsequent mortgagee Defendants 4 to 6 are subsequent transferees of part of the mortgaged property The defendants other than the mortgagors alleged that they had no knowledge of the mortgage. The mortgagors admitted execution of the bond, but denied receipt of consideration The court of first instance found that the mortgage bond, which was a registered document, had been duly

* Appeal No 511 of 1912 under section 10 of the Letters Patent

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BABBU v. SITA RAM

executed by the mortgagors As to consideration it cast the burden of proof on the plaintiff, and holding that the plaintiff had not discharged the burden, dismissed the claim. The lower appellate court rightly held that since receipt of consideration was admitted in the document itself and also before the Sub Registrar, the burden of proof as to non receipt of it was on the defendant but it says that as the plaintiff gave evidence and that evidence is not credible the suit must fail. I do not agree with the learned Judge of the lower appellate court on this point As defendants executants admitted receipt of consideration both in the document itself and before the Sub Registrar, it was for them to prove that the admission was untrue If the evidence adduced by the plaintiff proved that consideration was not paid, that is to say, that the defendants admission was untrue, of course the defendants could rely on that evidence, but in this case the plaintiff himself pledged his oath and one witness stated that consideration had been paid. The lower appellate court disbelieves their statements Assuming that they did not state the truth, it cannot be said that their statements proved that consideration was not paid and that the defendants admissions were in fact untrue The defendants made no attempt to examine witnesses The plaintiff need not have adduced any evidence and if their evidence was not sufficient to prove payment of consideration, it did not disprove the admission made by the defendants The lower appellate court was in my opinion wrong in holding that payment of consideration had not been proved In the face of the defendants admission which stood unrebutted such a finding could not be arrived at There is no other question involved in this appeal I accordingly allow the appeal set aside the decrees of the courts below and decree the plaintiff's claim with costs in all courts"

The defendants appealed

Babu *Sital Prasad Ghosh* and Babu *Girdhari Lal Agarwala*, for the appellants

Pandit *Braj Nath Vyas*, for the plaintiff respondent

RICHARDS, C J, and TUDBALL, J—This appeal arises out of a suit on foot of a mortgage dated the 23rd of September, 1898. There were a number of defendants besides the mortgagors The present appellants Babbu and Sukhnandan Lal were defendants as purchasers of a portion of the mortgaged property. The court of first instance, according to the judgement of the lower appellate court, threw the onus of proving the payment of consideration upon the plaintiff, and held that he had not discharged this onus and accordingly dismissed the suit The lower appellate court itself also dismissed the suit, stating that, while the court of first instance was wrong in throwing the onus upon the plaintiff, still, the witnesses having been examined and not believed, the suit was rightly dismissed.

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BABBU v. SITA RAM

A learned Judge of this Court finding that there was an acknowledgment of the money in the deed itself, (and apparently, believing that there was no other evidence adduced on behalf of the defendants) held that both the courts below were wrong and decreed the plaintiff's claim

We entirely agree with the remarks of the learned Judge of this Court. Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *primâ facie* evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage The presumption of course can be rebutted and the mere fact that a court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendants from producing evidence to show that notwithstanding the acknowledgment in the body of the deed there was no consideration in fact We would like here to point out that as a general rule the subordinate courts ought to hear the evidence on both sides Their decisions are not always final If they do not hear the evidence on both sides in cases in which appeals lie the defendant may be put in the awkward position of having the case decided on appeal against him although his evidence has not been heard To some extent we rather suspect that this is what happened in the present case Evidently the learned Munsif was very dissatisfied with the plaintiff's evidence. We find, however on referring to the record that one witness was examined on behalf of the defendants who deposed to facts, which, if believed would go to show that there was no consideration for the bond in suit also that he mentioned some persons who could corroborate this statement, and that these persons were summoned as witnesses The facts were evidently not brought under the notice of the learned Judge of this Court owing very likely to the fact that the pleader on behalf of the present appellants had died and they were unrepresented when the appeal was before him We might also mention that the plaintiff and the appellant Sukhnandan Lal had come to terms and that the decree as against Sukhnandan could only have been in the terms of the compromise

We allow the appeal, set aside the decree of this Court and also of the lower appellate court, and remand the case to the court of first instance with directions to proceed to hear the evidence for the defence and to decide the case according to law The Court will be entitled, after hearing the defendant's evidence, if it thinks it necessary so to do, to hear any further evidence which the parties may adduce Costs here and heretofore, including both hearings in this Court will be costs in the cause.

Appeal decreed and cause remanded

REVISIONAL CRIMINAL.

1914 May 16

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

EMPEROR v NARAIN *

Criminal Procedure Code, section 282—Jury—Juror discharged during trial and fresh juror substituted—Trial not recommenced—Invalidity of proceedings

On a trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place. The trial, however, was not commenced afresh but the evidence given by the two witnesses was read over to and admitted by them *Held* that this procedure was inadmissible and the trial so held invalid

THIS was a reference under section 307, clause (1), of the Code of Criminal Procedure made by the Sessions Judge of Benares, who had disagreed with the finding of a jury in a trial on a charge of theft It was, however, brought to the notice of the High Court that during the trial, one of the jurors had been discharged on account of his deafness and a new juror substituted, and further that the trial had not, on this, been recommenced, but the evidence of the witnesses already examined had merely been read over to and admitted by them in the presence of the new juror

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

Munshi *Harnandan Prasad*, for the opposite party

MUHAMMAD RAFIQ and PIGGOTT, JJ —This is a reference by the learned Sessions Judge of Benares under section 307, clause (1), of the Code of Criminal Procedure. It seems that one Narain was tried in the court of the learned Sessions Judge with the help of jury on a charge of theft. The charge was denied by

* Criminal Reference No. 299 of 1914.

1914

EMPEROR v. NARAIN

Narain The prosecution examined three witnesses in support of the charge and the accused gave evidence to show that he bore a good character The jury returned a unanimous verdict of not guilty The learned Sessions Judge being of opinion that the verdict of the jury was flagrantly in opposition to the evidence in the case and was perverse did not accept it and has submitted the case to this Court under section 307, clause (1), of the Code of Criminal Procedure We find on a perusal of the record that after the first two witnesses for the prosecution had been examined it was discovered that one of the jurors was deaf and had not followed the trial at all He was discharged and another juror was added The learned Sessions Judge did not commence anew the trial of Narain but called up the first two witnesses for the prosecution and had their statements read out to them and they admitted that their evidence which they had heard was correct The trial then proceeded and other witnesses were examined for prosecution and for the defence Apart from the question whether the verdict of the jury is perverse or not we find that the trial before the learned Sessions Judge has been defective in view of the provisions of section 282 of the Code of Criminal Procedure It was not open to the learned Sessions Judge to merely read over the statements of the first two witnesses and obtain their admissions to validate the trial where one of the jurors had been discharged and replaced by a new juror We therefore direct that Narain be retried before another jury according to law

Retrial ordered

APPELLATE CIVIL

Before Mr Justice Tudball and Mr Justice Piggott

1914
May 18

MUHAMMAD HUSAIN (DECREE HOLDER) v INAYAT HUSAIN AND ANOTHER (JUDGEMENT DEBTORS) *

Execution of decree—Limitation—Act No IX of 1908 (Indian Limitation Act) schedule I article 182—Application in accordance with law—Judgement debtor missing

A decree for sale on a mortgage executed by A was passed against A (who was reported to be missing at the time) and against B C D and E who were

*Second Appeal No 1293 of 1913 from a decree of Rama Das officiating first Additional Subordinate Judge of Agra, dated the 2nd of July 1913 confirming a decree of Kauleshwar Nath Rao Munsif of Bulandshahr, dated the 3rd of April, 1913

in possession of the mortgaged property and were the heirs presumptive of A jointly *Held* that in the absence of any evidence that A was dead an application for execution of this decree against A alone was an application in accordance with law within the meaning of article 182 of the first schedule to the Indian Limitation Act, 1908

THE facts of this case were briefly as follows.—

One Mahmud Husain obtained a decree for sale upon a mortgage executed by Ewaz Husain, against the mortgagor, and inasmuch as the mortgagor was missing at the time of suit against four other persons who were his heirs presumptive and were in possession of the mortgaged property. The decree was a joint decree against all five defendants The decree holder applied for execution as against Ewaz Husain alone and brought part of the mortgaged property to sale But the other defendants filed objections and in appeal their objections were allowed and the execution proceedings set aside On a second application for execution being made by the decree holder it was found by the Court of first instance, and this finding was upheld on appeal, that the application was time-barred because the first application was not an "application in accordance with law" and also because the decision on that application was *res judicata* The decree holder appealed to the High Court

Maulvi *Shafi uz-zaman* for the appellant

The Hon'ble Dr *Tej Bahadur Sapru*, for the respondents

TUDBALL and PIGGOTT JJ —This is a second appeal arising out of execution proceedings The decree-holder Mahmud Husain, on the 5th of April 1909 obtained a preliminary decree for sale against five persons These five persons were Ewaz Husain Inayat Husain Farzand Husain Hadi Husain and Mahmud Husain The mortgage deed the basis of his claim, had been executed by Ewaz Husain alone The suit originally was instituted against him alone, but apparently, as his whereabouts could not be traced and as the other four persons were actually holding possession of the property and moreover were his heirs, the decree-holder made them parties to the suit and his claim was decreed *ex parte* as against Ewaz Husain and on contest as against the other four defendants On the 18th of December, 1909, the final decree for sale was passed On the 14th of January, 1910, i e, within one year of the final decree, the decree-holder applied for execution of his decree, and in the necessary column he

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MUHAMMAD HUSAIN v. INAYAT HUSAIN

entered all the names of the judgement debtors and he asked to have his decree executed as against Ewaz Husain For some reason which we are unable to understand, the court directed notice to issue to Ewaz Husain That was returned by the serving officer with a report to the effect that Ewaz Husain refused to accept service Part of the property was put up to auction sold and purchased by the decree holder Thereupon some of the other judgement debtors filed objections to the sale and asked to have it set aside Their application was first rejected but on appeal the learned District Judge accepted the application and set aside the sale on the ground that the notice of the application for execution had not been given to the appellants before him On the 10th of January, 1913, the present application for execution was made and that application has been rejected by both the courts below on the ground that it is barred by limitation Both the courts have held that the application of the 14th of January, 1910, i e, the first application for execution as against Ewaz Husain, was not an application made in accordance with law and therefore did not operate to save the bar of limitation and as the present application has been made more than three years from the date of the final decree, it is barred by limitation The two grounds on which the courts below have come to this conclusion are first of all that the application of the 14th of January, 1910, was not in accordance with law, in that it had been made against a man who was missing at the date of the application, and, secondly, they have held that it is *res judicata* between the parties that the first application for execution was not in accordance with law by reason of the decision of the District Judge mentioned above in that he set aside the sale of the property The courts below have not found that Ewaz Husain was dead on the 14th of January, 1910 They have come to the conclusion that he has been missing for a large number of years but there is no evidence on the record to show that he is dead or that he was dead on the date of the former application Our attention has been called to a decision of this Court in which it has been held that an application for execution made as against a deceased person is not an application in accordance with law. It is argued that equally so an application for execution made against a man whose whereabouts are unknown

is bad in law With this argument we find it impossible to agree Until a judgement-debtor is dead it is impossible to bring upon the record his heirs The bare fact that a man's whereabouts are not known is not sufficient to deprive the decree holder of the fruits of his decree, and we know of nothing in law which would make an application for execution as against him an invalid application

1914

MUHAMMAD HUSAIN v INAYAT HUSAIN

With regard to the plea of *res judicata* an examination of the District Judge's judgement will show that he nowhere held as between the parties that the application of the 14th of January, 1910, was not in accordance with law The basis of his judgement setting aside the sale was the fact that no notice was issued to the appellant before him The point is clearly not *res judicata* between the parties In view also of the first portion of explanation No 2 attached to article 182 of the Limitation Act, the decree having been a joint one against Ewaz Husain and the other judgement debtors, the application of the 14th of January, 1910, was a good application and was made in accordance with law The present application is made within three years of that date and is therefore not barred by limitation We allow the appeal, set aside the orders of the courts below, and remand the case through the lower appellate court to the first court with directions to restore the case to its original number and to proceed to dispose of it according to law The appellants will have their costs in this Court and in the courts below

Appeal allowed

REVISIONAL CRIMINAL.

Before Mr Justice Piggott

EMPEROR v MEHAR CHAND AND ANOTHER.*

1914 May 19

Criminal Procedure Code section 423—Sentence—Alteration of sentence whether amounting to an enhancement or not

A Magistrate on a conviction under section 379 of the Indian Penal Code sentenced the accused to one month's rigorous imprisonment and a fine of Rs 5 each and in case of default in payment of the fine to one week's further imprisonment The District Magistrate on appeal by the accused altered the sentence to one of three days imprisonment and a fine of Rs. 100 and in default of payment of fine to a further imprisonment of one month. *Held* that in the

* Criminal Reference No. 321 of 1914.

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EMPEROR v. MEHAR CHAND

ab ence of any evidence that the accused were unable to pay the fine or regarded the s ntence passed on appeal as more severe than the orig nal sentence it could not be said that the sentence had been enhanc d *Queen Empress* v *Chagan Jagannath* (1) and *Bakthavatsalu Naidu* v *Emperor* (2) doubted *Rakhal Raja* v *Khirode Pershad Dutt* (3) referred to

THE facts of this case were as follows —

Mehar Chand and Kanak Singh were tried before a Subordinate Magistrate on a charge under section 379 of the Indian Penal Code and were sentenced each to undergo rigorous imprisonment for a period of one month and to pay a fine of Rs 5 A period of one week's imprisonment was prescribed in default of payment of fine Compensation was ordered to be paid to the complainant Chajju out of the fine if realized Mehar Chand and Kanak Singh appealed to the District Magistrate He affirmed the conviction but varied the sentence passed He reduced the period of imprisonment to one of three days, which period the appellants before him had actually undergone, but he directed the appellants each to pay a fine of Rs 100 or in default to undergo imprisonment for one month. The Additional Sessions Judge, when the case was brought before him in revision, found no reason for interference with the conviction, but referred the matter to the High Court, holding that the District Magistrate s order amounted to an enhancement of the sentence and was, therefore, illegal

PIGGOTT, J —This is a reference by the Additional Sessions Judge of Meerut, arising out of the following facts Mehar Chand and Kanak Singh were tried before a Subordinate Magistrate on a charge under section 379 of the Indian Penal Code and were sentenced each to undergo rigorous imprisonment for a period of one month and to pay a fine of Rs 5 each A period of one week's imprisonment was prescribed in default of payment of fine Compensation was ordered to be paid to the complainant Chajju out of the fine, if realized Mehar Chand and Kanak Singh appealed to the District Magistrate He affirmed the conviction but varied the sentence passed He reduced the period of imprisonment to one of three days which period the appellants before him had actually undergone, but he directed the appellants each to pay a fine of Rs 100 or in default to

(1) (1898) I L R 23 Bom., 439 (2) (1906) I L. R., 30 Mad., 103

(3) (1899) I. L R, 27 Calc, 175.

undergo imprisonment for one month. The Additional Sessions Judge, when the case was brought before him in revision, found no reason for interference with the conviction, but has referred the matter to this Court, holding that the District Magistrate's order amounts to an enhancement of the sentence and is, therefore, illegal. There is a good deal of authority for the proposition that the sentence passed by the District Magistrate in this case does not amount to an enhancement of the punishment, inasmuch as the aggregate period of imprisonment which the accused persons might have to undergo, even in default of payment of fine, does not exceed the total amount of imprisonment which they might have to undergo under the order of the trying Magistrate, vide *Queen Empress* v. *Chagan Jagannath* (1) and *Bakthavatsalu Naidu* v. *Emperor* (2). I venture to think that these rulings overlook the fact that a sentence of fine is not wiped out by serving the alternative sentence of imprisonment but is still liable to be enforced under process of the Court. I should be inclined personally to prefer the decision of the learned Judges of the Calcutta High Court, *Rakhal Raja* v. *Khirode Pershad Dutt* (3) It was there held that no general rule can be laid down to determine what is or is not an enhancement of sentence, when only a portion of the sentence is altered to a punishment of a lesser degree of severity. In each case the court has to consider what is the effect of the alteration. For the disposal of the reference before me, however, it does not matter which of the opinions above expressed I am prepared to adopt. Sitting as a Court of Revison I would not interfere with the order of the court below, unless the persons invoking my interference can satisfy me that the order is open to objection on legal grounds. If Mehar Chand and Kanak Singh had put forward an affidavit showing that a fine of Rs. 100, was grossly out of proportion to their means, or if in their petition to the Sessions Judge they had even stated in plain terms that they would prefer to undergo the sentence passed by the trying Magistrate rather than pay the fine imposed by the District Magistrate in appeal, I think I should have been prepared to consider the question from the point of view taken by the learned Judges of the Calcutta High Court in the ruling

(1) (1898) I. L. R., 23 Bom., 439. (2) (1906) I. L. R., 30 Mad., 103.
(3) (1899) I. L. R., 27 Calc., 175.

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EMPEROR v. MEHAR CHAND.

to which I have referred I find, however, nothing in the record before me to satisfy me that Mehar Chand and Kanak Singh really consider a fine of Rs 100 each a heavier sentence than one of a month's rigorous imprisonment, for that is practically what the matter comes to The conclusion I arrive at, therefore, is that I am not satisfied that in this case the court of appeal had in fact enhanced the sentence passed by the court of first instance I decline to interfere; let the record be returned

Record returned

APPELLATE CIVIL.

1914
May, 19

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Tudball

PIR KHAN (PLAINTIFF) v FAIYAZ HUSAIN AND OTHERS (DEFENDANTS)*

Pre-emption—Muhammadan law—Vendor a Shia and pre emptor a Sunni—Shia law to be applied

In a suit for pre-emption the vendor was a Shia Muhammadan, the vendees Hindus and the pre-emptor a Sunni The claim was laid in the alternative either on custom or on the Muhammadan law The custom set up was not proved. *Held* that the Muhammadan law applicable was that of the vendor, namely, the Shia law, and that the pre emptor had no case *Jog Deb Singh* v *Mahomed Afzal* (1) not followed. *Abbas Ali* v *Maya Ram* (2), *Qurban Husain* v *Chote* (3) and *Gobind Dayal* v *Inayat ullah* (4) referred to

THIS was a suit for pre emption The plaintiff pre emptor was a Muhammadan of the Sunni sect The vendor was also a Muhammadan, but of the Shia sect. The vendees were Hindus and strangers to the village. The plaintiff based his claim, first, on a custom prevailing in the village, in which he was a co sharer, and in the alternative on the Muhammadan law, with the requirements of which he alleged that he had complied The court of first instance found that the plaintiff had failed to establish the existence of the custom set up by him, and, as regards the alternative claim under the Muhammadan law, it held that the law applicable was the Shia law, namely, that of the vendor, and according to that law the plaintiff had no right to pre-empt. It, therefore, dismissed the suit. The plaintiff appealed to the High Court

* First Appeal No 213 of 1913 from a decree of Rama Das Subordinate Judge Saharanpur, dated the 11th of March, 1913

(1) (1905) I. L R, 32 Calc 982 (3) (1899) I L R, 22 All 102
(2) (1888) I L R, 12 All, 229 (4) (1885) I L R, 7 All 775

The Hon'ble Dr. *Sundar Lal* and The Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption of a zamindari share and a house. The plaintiff appellant is a co-sharer in the mahal. He is a Mussalman of the Sunni sect. The vendor is also a Mussalman but of the Shia sect. The vendees are Hindus and strangers to the village. The plaintiff bases his right on a custom prevailing in the village among the members of the co-parcenary body. In the alternative he claims a right based on Muhammadan law and alleges that he performed the two necessary preliminary demands.

The court below has dismissed the suit. It held that the plaintiff had failed to prove satisfactorily the existence of the alleged custom.

In regard to the alternative claim it held that the plaintiff was not entitled to claim the application of the Sunni rule of pre-emption to this case, the vendor being a Shia, and under the Shia rule of pre-emption, no right of pre-emption could be claimed in the circumstances of the present case, as there were admittedly many more than two co-sharers. It must be pointed out that the share sold is Khata Khewat No. 19, in which the plaintiff has no share, but it is part of a patti in which he has a share. To this patti is attached certain *shamilat* land in which all the co-sharers of the patti have a share and there is also some *shamilat deh* in which all the co-sharers of the mahal have shares. The house in suit stands on the *shamilat deh* and belongs to the vendor only. The plaintiff claims his right because he has a share in the patti and village. On appeal it is urged—

(1) That the evidence produced is amply sufficient to prove the custom.

(2) That if this is not correct then the lower court was wrong in applying the Shia rule of pre-emption, as the Muhammadan law of pre-emption prevailing in these provinces must be taken to be the Sunni law, irrespective of the creed of the parties, and therefore the lower court ought to have decided the third and fourth issues, which it has not touched.

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May 21

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

ALLAH JILAI AND ANOTHER (DEFENDANTS) *v* UMRAO HUSAIN AND OTHERS (PLAINTIFFS) AND ZAHIR HUSAIN AND ANOTHER (DEFENDANTS) *

Act No IX of 1908 (Indian Limitation Act) schedule I article 120—Suit for declaration of title—Previous unsuccessful application to correct entry in village papers—Cause of action—Limitation

In 1875 the owners of certain zamindari property sold their interest in it with the exception of 26 bighas In 1888 the vendors were recorded as exproprietary tenants of these 26 bighas In 1903 the representatives of the vendors applied to have the village papers corrected but their application was dismissed and they were told to go to the Civil Court In 1910 the representatives of the purchasers applied to have rent assessed on the 26 bighas and obtained an order in their favour The representatives of the vendors thereupon brought the present suit in the Civil Court for a declaration that they were proprietors *Held* that whatever cause of action the plaintiffs might have had before the proceedings of 1910 the order passed in those proceedings gave them a fresh cause of action and their suit was not barred by limitation *Legge* v *Rambaran Singh* (1) *Akbar Khan* v *Turaban* (2) *Sheopher Singh* v *Deonarain Singh* (3) *Purshottam* v *Parmanand* (4) and *Skinner* v *Shankar Lal* (5) referred to

THE facts of this case were as follows —

One Faiz Ali had an interest in patti Jamal ud din, mauza Sambhal Khera He died leaving a widow and four daughters, who, in 1875, sold the entire interest in the patti with the exception of 26 bighas to which the present suit relates It appears that in 1888 the vendors were recorded as exproprietary tenants of these 26 bighas The plaintiffs and the fourth defendant are representatives of the vendors of 1875 and they have brought this suit for a declaration that they are the proprietors of the 26 bighas In 1903 the plaintiffs applied to the revenue authorities for correction of the village papers The defendants' predecessors objected and the order of the court was as follows — "The applicants are in possession of the land and can remain so If they want to have any change made in their capacity they should move a civil court for it I therefore dismiss the application' In January 1910 the defendant applied to the Revenue Court under section 36 of the Land Revenue Act of 1901 for

* Second Appeal No 506 of 1913 from a decree of Muhammad Shafi Additional Judge of Meerut dated the 18th of February, 1913 confirming a decree of Muhammad Hasan Additional Subordinate Judge of Meerut dated the 28th of September, 1912

(1) (1897) I L R, 20 All, 35
(2) (1908) I L R, 31 All., 9
(3) (1912) 10 A. L J, 413.
(4) Misc. No. 279 of 1908.
(5) S.A. No 263 of 1907

assessment of rent on the 26 bighas The present plaintiffs objected that they were the owners of the land and not exproprietary tenants of it The defendants replied that the matter had been settled by the order of the Revenue Court passed in 1904 The court decided that it could not go behind the order of 1904 and it proceeded to assess the rent on the holding The representatives of the vendors thereupon brought the present suit in the Civil Court for a declaration that they were proprietors The courts below decided in favour of the plaintiffs The defendants appealed

Dr *Satish Chandra Banerji* and the Hon'ble Dr *Tej Bahadur Sapru* for the appellants

Mr *A H C Hamilton* for the respondents

CHAMIER and MUHAMMAD RAFIQ JJ —One Faiz Ali had an interest in patti Jamal ud-din mauza Simbhal Khera He died leaving a widow and four daughters who in 1875, sold the entire interest in the patti with the exception of 26 bighas to which the present suit relates It appears that in 1888 the vendors were recorded as exproprietary tenants of these 26 bighas The plaintiffs and the fourth defendant are representatives of the vendors of 1875, and they have brought this suit for a declaration that they are the proprietors of the 26 bighas In 1903 the plaintiffs applied to the revenue authorities for correction of the village papers The defendants predecessors objected and the order of the court was as follows — The applicants are in possession of the land and can remain so If they want to have any change made in their capacity they should move a Civil Court for it I therefore dismiss the application In January 1910 the defendants applied to the Revenue Court under section 36 of the Land Revenue Act of 1901 for assessment of rent on the 26 bighas The present plaintiffs objected that they were the owners of the land and not expropriotary tenants of it. The defendants replied that the matter had been settled by the order of the Revenue Court passed in 1904 The court decided that it could not go behind the order of 1904, and it proceeded to assess the rent on the holding. The courts below have decided in favour of the plaintiffs

In second appeal to this Court two points were taken, first that the suit was not maintainable in a Civil Court, and [illegible]

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ALLAH JILAI v UMRAO HUSAIN

maintainable it was barred by limitation The first point after some argument was abandoned With reference to the second point the learned advocate for the defendants appellants relies upon the decisions of this Court in *Legge* v *Rambaran Singh* (1) and *Akbar Khan* v *Turaban* (2) The respondents rely upon other decisions of this Court which will be referred to presently All that was decided in the case of *Legge* v *Rambaran Singh* was that article 120 of the Limitation Act is applicable to a suit of this nature, and that the six years run from the date on which the cause of action arises In Miscellaneous No 279 of 1908, *Purshottam* v. *Parmanand*, certain lands alleged to belong to the plaintiff had been recorded before 1896 in the village papers as the common land of the village Several years afterwards, in partition proceedings, it was proposed to treat the land in question as the common land of the village and the plaintiff then sued for a declaration of his title This Court held that the suit was within time having been brought within six years of the partition proceedings. The learned Judges observed that so long as the plaintiff was allowed to remain in undisturbed possession it was not obligatory on him to institute a suit for declaration of title In *Skinner* v *Shankar Lal*, Second Appeal No 263 of 1907, the defendant to the suit had got his name entered in the *khewat* in May, 1899, in spite of the plaintiffs' objection On the strength of this entry a suit was brought for profits of the share more than six years after the order of 1899 The plaintiffs then sued for a declaration of their title It was held that the suit was within time, inasmuch as the institution of a suit for profits gave the plaintiffs a fresh cause of action In *Sheopher Singh* v. *Deonarain Singh* (3) the plaintiffs had all along been in possession of the land in suit, but in 1901 the settlement authorities had made an entry which showed that they were entitled to a smaller area They had objected to the entry, but their objection had been thrown out They, however, remained in undisturbed possession of all the land to which they were entitled In 1909 the Collector ordered that the entry should be corrected, but the Commissioner set aside his order and the plaintiffs then brought

(1) (1897) I L R 20 All. 35 (2) (1908) I L. R, 31 All, 9

(3) (1912) 10 A L J, 418.

a suit for declaration One of us, on the strength of the two cases last cited, held that the suit was within time, inasmuch as the proceedings of 1909 gave the plaintiffs a cause of action, whether the proceedings of 1901 gave them cause of action or not The decision was confirmed in an appeal under the Letters Patent In *Akbar Khan* v *Turaban* (1) the name of the defendant had been entered in the revenue papers in respect of the property in 1895 A suit for declaration of title was brought in 1904 and the question of limitation was raised. On behalf of the plaintiffs it was contended that a fresh cause of action accrued to them in 1903 when the defendant objected to the correction of the *khewat* This Court held that the proceedings of 1903 did not constitute a fresh cause of action They regarded the refusal to allow the entry to be corrected as a continuation of the original cause of action

In the present case, notwithstanding the order of April, 1904, the plaintiffs remained in possession of the land without liability to pay rent therefor It was not until rent was assessed in the proceedings of 1910 that they became liable to pay rent It seems to us that the order of 1912 gave the plaintiffs an entirely fresh cause of action That order was almost equivalent to a suit against them for rent of the land On the authorities we think that the decision of the court below was correct. We dismiss this appeal with costs

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Chamier

EMPEROR v KUNDAN AND OTHERS *

1914
May 22.

Criminal Procedure Code sections 118 and 123—Security for good behaviour—Imprisonment in default not to include solitary confinement

The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour cannot be made to include solitary confinement

THIS was a reference by the Sessions Judge of Budaun in respect of an order passed by a magistrate of that district. The facts which gave rise to the reference sufficiently appear from the order of the Sessions Judge, which was as follows —

* Criminal Reference No. 351 of 1914.

(1) (1908) I. L. R., 31 All., 9.

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"The above three persons were asked to execute a bond of Rs 200, with sureties of Rs 200, for maintaining good behaviour, under section 110 of the Code of Criminal Procedure The order of the Sub Divisional Magistrate Mr Shirafat-ullah Khan is in these terms —'I confirm my order directing each of the accused to undergo rigorous imprisonment for one year, including solitary confinement for two months unless bonds in Rs 200, and sureties in Rs 200, each are forthcoming'

"The jail authorities have referred the case to this Court regarding the order of solitary confinement The order of solitary confinement is evidently a mistake Section 123 of the Code of Crim nal Procedure allows only imprisonment, simple or rigorous, as the case may be It does not allow solitary confinement The case is therefore, submitted to the Hon ble High Court with a recommendation that the order of solitary confinement be set aside The explanation of Magistrate will now be taken and submitted Meanwhile the order of solitary confinement will be suspended."

The following order was passed by—

CHAMIER, J —In this case the Magistrate passed an order under section 118 of the Code of Criminal Procedure, and when the security demanded was not forthcoming directed that the persons concerned should be rigorously imprisoned for one year, of which two months would be spent in solitary confinement He had no power to order solitary confinement in a case of this kind So much of his order as directs that Kundan, Sumer Singh and Kallan Shah be kept in solitary confinement for two months is set aside

Order modified.

1914
May, 23

Before Mr Justice Piggott

EMPEROR *v* KUNDAN*

Criminal Procedure Code, sections 367 and 421—Appeal—Appeal summarily dismissed—How far court bound to record reasons for dismissal

A court of criminal appeal is not bound, when dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, to write a judgement as defined in section 367 of the Code It is however, advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision

Queen Empress v *Warubai* (1) followed *Rash Behari Das* v *Balgopal Singh* (2), *Queen Empress* v *Ram Narain* (3) *Queen Empress* v *Nannhu* (4) and *Queen Empress* v *Pandeh Bhat* (5) referred to

* Criminal Revision No 237 of 1914 from an order of R C Hobart, Magistrate First class of Moradabad dated the 24th of January, 1914

(1) (1895) I L R 20 Bom 540
(2) (1893) I L R 21 Calc , 92
(3) (1889) I L R 8 All 514
(4) (1895) I L R 17 All. 241
(5) (1897) I L R , 19 All, 506.

THE facts of this case were briefly as follows —

One Kundan was convicted by a magistrate of the third class of the offence of criminal trespass He appealed and his appeal was dealt with by a magistrate of the first class specially empowered On his appeal Kundan was represented by a pleader, and notice of the date of hearing was given to him, but no notice was given to the Government Pleader to appear and support the conviction On the date fixed the appellate court heard the pleader for the appellant and then proceeded to record an order on a printed form dismissing the appeal but giving no reasons for rejecting the pleas urged by the appellant The case was in fact disposed of under the provisions of section 421 of the Code of Criminal Procedure From this order Kundan applied in revision to the High Court his principal plea being that the appellate court was bound to record its reasons for dismissing the appeal, if not to write a judgement in the form prescribed by section 367 of the Code

Mr *Ibn Ahmad* for the applicant

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

PIGGOTT J —In this case a complaint was laid before a magistrate of the third class in which six persons were accused of having committed criminal trespass under section 447 of the Indian Penal Code The complainant's case was that he had first been put in possession of certain land by the civil court in execution of a decree passed against two of the persons accused, and that thereupon the six accused persons acting in concert had forcibly re entered into possession of the land in question and had placed certain stacks and manure heaps upon it with a view to assert their possession against the complainant in the teeth of the civil court decree The magistrate issued process against three persons only, and in a somewhat curious judgement eventually found two of them not guilty He convicted one man Kundan apparently on the ground that the stacks and manure heaps placed on the disputed land were admitted by Kundan to belong to himself or to members of his family, so that on this admission, considered in the light of the prosecution evidence it appeared that Kundan had been guilty of criminal trespass There was an

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EMPEROR v. KUNDAN

appeal which was dealt with by a Magistrate of the first class specially empowered I have examined the record and I am satisfied that the Magistrate disposed it summarily under the provisions of section 421 of the Code of Criminal Procedure The appeal having been presented by a pleader the magistrate was bound to give the pleader an opportunity of being heard in support of the same He fixed a date for this purpose and sent for the record, but he did not issue notice to any officer appointed by the Local Government to appear in support of the conviction From this as well as from the final order passed it is clear that the appeal was in fact dealt with under section 421 aforesaid The magistrate in disposing of the appeal simply availed himself of a printed form which is issued by this Court presumably as a form in which the result of an appeal summarily dismissed may be communicated to the court below The only order therefore passed is to the effect that the appellate court had heard a certain pleader for the appellants and finding no cause for interference with the proceedings of the court below rejected the appeal and ordered the record to be returned The first point taken in revision is that the above order is not a judgement according to law It has been expressly held in *Queen Empress* v *Warubai* (1) that in rejecting an appeal under section 421 of the Code of Criminal Procedure an appellate court is not bound to write a judgement and a similar ruling of the Calcutta High Court in *Rash Behari Das* v *Balgopal Singh* (2) is there referred to There are three rulings of this Court bearing more or less on this question *Queen Empress* v *Ram Narain* (3) *Queen Empress* v *Nannhu* (4) and *Queen Empress* v *Pandeh Bhat* (5) In this last case however the court was dealing with the judgement in an appeal which had not been dismissed summarily and was concerned only to consider what were the minimum requirements of the law as to a judgement of a Court of Criminal Appeal I do not find that in either of the two older cases of this Court it was laid down that a Court of Criminal Appeal when dismissing an appeal summarily is bound to write a judgement It was laid down that it was advisable that such court should give reasons

(1) (1895) I L R 20 Bom 540
(2) (1893) I L R 21 Calc 92
(3) (1886) I L R 8 All 514
(4) (1895) I L R 17 All 241
(5) (1897) I.L.R 19 All., 506

for rejecting an appeal, in view of the possibility of its order being challenged by an application for revision. From this expression of opinion I have no desire to dissent. A difficulty arises in practice when there has been an appeal which on the face of it raises questions of law and fact requiring consideration and such an appeal is dismissed summarily by an order which does not contain any statement of the reasons upon which it is passed. In such cases this Court would naturally feel disposed to direct the court below to rehear the appeal and to record an order showing its reasons for overriding the pleas taken in the petition of appeal. In the present case the petition of appeal to the magistrate contained in substance two pleas: one was that on the facts alleged by the prosecution it was not shown that any offence was committed and the other was that the defence evidence in the case was more worthy of credit than that for the prosecution. The former of these pleas would not bear examination. As regards the second in view of the fact that the appellants were represented by a pleader before the appellate court I have no doubt that the evidence on the record was fully brought to the notice of the magistrate. I wish to make it clear that I do not consider that the form of the order which the court below has passed in this case is a commendable one. The result, as it is, has been that I have had to give a certain amount of time to examining the record in order to satisfy myself whether I ought to remand the case for the appeal being reheard. This expenditure of time it was the magistrate's duty to have saved me from by writing such an order in appeal as to make it clearly unnecessary. On the broad ground taken in this application, however, I am in agreement with the decision of the Bombay High Court that the magistrate was not bound when dismissing this appeal summarily under section 421 of the Code of Criminal Procedure, to write a judgement as defined in section 367 of the same Code. Under the circumstances I am not prepared to interfere. The application is dismissed.

Application rejected.

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May 26.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Tudball.

JAGESHRA (PLAINTIFF) *v* DURGA PRASAD SINGH AND OTHERS (DEFENDANTS) *

Act No VII of 1870 (Court Fees Act), section 7, clause iv—Court fee—Suit for declaration and consequential relief—Valuation for purposes of court fee

A prior mortgagee brought a suit upon his mortgage and obtained a final decree for sale to realize Rs 6,818 12 5 A puisne mortgagee of part of the property covered by this decree, who had not been made a party to the prior mortgagee's suit, subsequently brought a suit against the prior mortgagee asking first, for a declaration that the defendant was not entitled to bring to sale in execution of his decree the property comprised in the plaintiff's mortgage, and, secondly, for an injunction restraining the defendant from bringing the said property to sale The first relief was valued at the amount of the defendant s decree, namely, Rs 6,818-12 5, and a court fee of Rs 10 was paid in respect of it The second relief was valued at Rs 100 only and a court fee of Rs 7-8 0 was paid

Held that the plaintiff was bound to pay an *ad valorem* fee on the amount at which the suit was valued, namely, on Rs 6,818-12 5.

THIS was a reference made by the taxing officer of the Court in respect of the court fee payable by the plaintiff appellant in a pending first appeal in respect of both the plaint and the memorandum of appeal The facts which gave rise to the reference are thus stated in the taxing officer's order :—

"The plaintiff is the subsequent mortgagee of certain property under a mortgage deed, dated the 22nd of January, 1900, executed by defendant No 3, who had previously mortgaged the same property along with other property to defendant No. 1 under three mortgage deeds, dated the 10th of June, 1895, the 3rd of October, 1895, and the 21st of December 1896 Defendant No 1, alleging himself to be the owner of the amount due on those mortgage deeds obtained on the 15th of July, 1910, a decree under order XXXIV, rule 4 of the Code of Civil Procedure in the court of the Subordinate Judge of Benares Subsequently, on the 3rd of August, 1912, he obtained in the same court a final decree under order XXXIV, rule 5, of the Code of Civil Procedure

" The plaintiff alleged that she was not made a party to the suit brought by defendant No 1 and prayed for the following two reliefs :—(1) It may be declared by the court that defendant No. 1 has no right to bring to sale the property mortgaged to the plaintiff detailed in the plaint in execution of the final decree obtained by defendant No 1 on the 3rd of August, 1912, and that the said decree is not binding upon the plaintiff. (2) An injunction may be issued to defendant No. 1 prohibiting him from taking out execution of the final decree against the property mentioned in the plaint Relief (1) was valued at

* Stamp reference in F. A No 204 of 1913.

R 6 818 12 5, the amount of the decree sought to be set aside, and a fixed fee of Rs 10 was paid thereon under article 17, clause iii, schedule II, of the Court Fees Act The second relief was valued at Rs 100, and an *ad valorem* court fee of Rs 7 8 was paid thereon. In the defence set up by defendant No 1 it was contended that the court fee on the relief No 2 was insufficient, and that the value of that relief should be fixed at an amount equal to the amount of the final decree passed on the 3rd of August, 1912 The court below framed an issue as follows .—'Is the suit for an injunction properly valued, if not what amount is payable as additional court fee ?' The court below, following a full Bench ruling of this Court *Jogal Kishor* v *Tale Singh* (1), held that the court must accept the valuation put by the plaintiff upon such relief under section 7, article iv, clause (*d*) of the Court Fees Act The court, therefore, held that the plaint was sufficiently stamped Against that decree, the plaintiff's suit having been dismissed on other grounds, the plaintiff has preferred this appeal paying a court fee of Rs 17 8, on the plaint The stamp reporter contends in a full report that an *ad valorem* court fee of Rs 355 is payable both in the lower court and in this Court, and that there is, therefore, a deficiency of Rs 675 which must be made good by the plaintiff appellant, Rs 337 8 in this Court, and Rs 337 8 for the lower court The learned counsel for the plaintiff appellant does not admit the correctness of the report, and states that the lower court's decision as regards the valuation of the plaint was correct. He also contends that if any further action has to be taken under section 12 of the Court Fees Act, it must be taken by the Bench hearing the appeal As in this case there is a deficiency for the lower court this course will be taken in accordance with the provisions of the Court Fees Act As regards the point at issue, the whole question was dealt with by me in my report, dated the 14th of May, 1913, in F A No 187 of 1912, *The Secretary of State for India in Council* v *Kanhi Lal*. As, however, in that appeal the objection raised to the office report was subsequently withdrawn, the question was not decided. In *Musammat Bibi Umatul Batul* v. *Musammat Nanji Koer* (2) it was held that the proper valuation of such relief by way of injunction was not necessarily the amount at which the plaintiff valued the relief, but that, if it is established that the valuation is improper, it is open to the court to determine such question and to take action under order VII, rule 11, of the Code of Civil Procedure. This ruling is, however, at variance with the Full Bench ruling of this Court referred to above, but as mentioned by me in my report of the 4th of May, 1913, in F A No 187 of 1912, I based my reason for believing that there is a deficiency of court fee in this case both in this Court and the lower court on another ground The rulings on which I rely are —*Hari Sanker Dutt* v *Kali Kumar Patra* (3) and *Raj Krishna Dey* v *Bipin Behari Dey* (4) In the appeal before this Court the valuation of the suit for purposes of jurisdiction is Rs. 6,918-12, and it appears to me that under section 8 of the Suits Valuation Act, No. VII of 1887, where it is laid down that in a suit under section 7, clause iv, of the Court Fees Act the value as determinable for the computation of court fees and the value for purposes of jurisdiction shall be the same and court fee must be paid

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JAGESHRA v DURGA PRASAD SINGH

(1) (1883) I L. R., 4 All., 320
(2) (1907) 11 C. W. N., 705.
(3) 1905) I L. R., 32 Calc., 734.
(4) (1912) I. L. R., 40 Calc., 245.

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on Rs 6 918 12 both in the lower court and in this Court being the valuation put by the plaintiff for purposes of jurisdiction. I may add that the Suits Valuation Act came into operation five years after the full Bench ruling of this Court mentioned above was passed Lay before the Bench hearing the appeal for orders

Babu *Piari Lal Banerji* for the appellant

The question that arises in this case is whether the plaintiff was or was not entitled to value for the purposes of court fees his relief at Rs 100 as he did Under the provisions of the Court Fees Act in a suit for an injunction where consequential relief is asked for the valuation for the purpose of court fees will be the valuation which the plaintiff put upon the relief in the plaint and it was settled law in this Court that it was open to the plaintiff to put any valuation he liked on the relief The Full Bench case *Jogal Kishor v Tala Singh* (1) is decisive on the point The provisions of the Suits Valuation Act relied upon by the taxing officer do not in any way nullify the effect of the full Bench ruling All that that section provides is that the valuation for the purpose of jurisdiction in certain class of cases shall be the same as valuation for the purpose of court fees which latter is to be determined according to the provisions of the Court Fees Act In other words, the valuation for the purpose of court fees is to be determined first according to the rules provided for in the Court Fees Act, and when such valuation is so determined the same figure is to be put down as the valuation for jurisdictional purposes What has to be determined first is the valuation for the purpose of court fees As to that the plaintiff is the sole judge and when once the plaintiff has determined that the valuation for jurisdictional purposes follows as a matter of course This section of the Suits Valuation Act does not provide that the valuation for jurisdictional purpose is to be determined first and that for the court fees after, but provides just the reverse

Mr *A E Ryves*, for the Board of Revenue, was not called upon to reply

TUDBALL J —This is a question as to the amount of court fee which the plaintiff appellant is bound to pay both upon the memorandum of appeal in this Court and on her plaint in the court

(1) (1882) I L. R., 4 All. 320

below. The plaintiff is the subsequent mortgagee of certain property. A final decree for sale was obtained by a prior mortgagee of certain property including that which had been mortgaged to the plaintiff. To that suit the plaintiff was not a party. She has now brought a suit against the prior mortgagee and has asked for the following two reliefs; first, that it may be declared by the court that the defendant No. 1 has no right to bring to sale the property mortgaged to the plaintiff, detailed in the plaint, in execution of a final decree obtained on the 3rd of August, 1912 and that the said decree is not binding upon the plaintiff; secondly, that an injunction may be issued to the defendant No. 1 prohibiting him from taking out execution of the final decree against the property mentioned in the plaint. The first relief was valued by the plaintiff in her plaint at Rs. 6,818-12, the amount of the decree sought to be set aside. The second relief was valued at Rs. 100. On the first relief the plaintiff paid a court fee of only Rs. 10, which is the court fee payable on a relief asking for a simple declaration. On the second relief she paid a court fee of Rs. 7-8. According to the report of the stamp officer an *ad valorem* court fee was payable by the plaintiff both in the court below and in this Court on the total sum of Rs. 6,918-12, the value placed upon the reliefs by the plaintiff herself. It seems to me that there is no doubt whatsoever in this matter in view of the clear language of section 7, clause iv, of the Court Fees Act. The plaintiff's suit is really one to obtain a declaratory decree, where consequential relief is prayed. According to the terms of the section she must pay an *ad valorem* court fee according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The section says:—"In all such suits the plaintiff shall state the amount at which he values the relief sought." In the present case the plaintiff has clearly valued the two reliefs at Rs. 6,918-12, and an *ad valorem* court fee is payable on that amount both for the court below and in this Court.

The question as to whether or not the plaintiff can put an arbitrary and fictitious valuation on the relief which he seeks, does not in my opinion arise in the present case at all, and it is really unnecessary to express an opinion on it. All I can say is that I have considerable doubt as to whether he is entitled to put

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on it a fictitious value and not the correct and proper value which is known to him.

The plaintiff will have to pay court fees for the court below and for this Court in accordance with the calculation in the stamp officer's report.

RICHARDS, C. J.—I concur. It is quite clear that under the provisions of section 7, clause iv, the plaintiff has to pay an *ad valorem* court fee according to the amount at which the relief sought is valued. In the present case the relief sought is valued at Rs. 6,918-12. Mr. *Piari Lal Banerji* in the course of his argument seemed to suggest that it was an oversight on the part of the plaintiff in valuing the relief at the amounts she did, and that it would have been quite open to her to have valued it at a much smaller sum. He seemed to me almost to suggest that we might treat the plaint as if a nominal valuation had been the value stated instead of Rs. 6,000 odd. I cannot at all agree to any such contention. Section 7 says that the *ad valorem* court fee shall be paid "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits the plaintiff shall state the amount at which he values the relief sought." It seems to me that the proper meaning to be attached to the latter words is that the plaintiff shall truly state the amount at which he values the relief sought, and that it cannot mean that a plaintiff is entitled to put in a fictitious value when the relief is capable of valuation. That this is not a mere matter of form becomes apparent when one considers that the valuation affects the jurisdiction and decides the court by which the case is to be tried. Obviously a defendant has a right that a case of great importance in which a large amount is involved should go before the tribunal in the first instance to which such cases ought ordinarily to go and not to any inferior court. I agree in the order proposed by my learned colleague.

BY THE COURT.—We allow the plaintiff appellant two months to make good the deficiency for the court below and for this Court, namely, Rs. 675.

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

1914
May 27

BALGOBIND AND ANOTHER (DEFENDANTS) *v* RAM SARUP AND OTHERS (PLAINTIFFS) AND UDAI RAM AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), *order XLI rule* 22 – *Suit for dissolution of partnership Appeal—Cross objections filed by one respondent against another*

Held that on an appeal in a suit for dissolution of partnership it is competent to the Court to allow a respondent to take cross objections against another respondent *Jadunandan Prosad Singh* v *Deo Narain Singh* (1) and *Abdul Ghani* v *Muhammad Fasih* (2) referred to

THE facts of this case were as follows —

In a suit for dissolution of partnership a decree for dissolution was passed and a receiver was appointed to make up the accounts of the partnership and submit a report On receipt of the receiver s report a decree was passed The plaintiffs in the suit preferred an appeal to the District Judge, and some of the respondents filed cross objections

Niadar Mal one of the respondents to that appeal, in his cross objections raised a question between himself and another respondent which did not concern the appellants The District Judge considered the objections both on behalf of the appellants and the respondents and modified the decree of the first court Two of the respondents appealed to the High Court contending, *inter alia*, that the cross objection filed by Niadar Mal ought not to have been entertained by the lower appellate court

Dr *Surendro Nath Sen*, for the appellants

The Hon ble Pandit *Moti Lal Nehru*, Mr *J M Banerji* and Babu *Lalit Mohan Banerji*, for the respondents

CHAMIER and MUHAMMAD RAFIQ, JJ —This appeal arises out of a suit for the dissolution of a partnership A decree for dissolution was passed and a receiver was appointed to make up the accounts of the partnership and submit a report On receipt of the receiver's report a decree was passed The plaintiffs in the suit preferred an appeal to the District Judge, and some of the respondents filed cross objections Niadar Mal, one of the respondents to that appeal, in his cross objections raised a question

* Second Appeal No 791 of 1913 from a decree of Mubarak Husain, Second Additional Judge of Meerut dated the 27th of February, 1912, modifying a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 10th of April, 1911.

(1) (1911) 16 C W N., 612. (2) (1905) I. L. R., 28 All., 95.

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BALGOBIND v RAM SARUP

between himself and another respondent which did not concern the appellants The learned Judge, after a careful consideration of the objections both on behalf of the appellants and the respondents, modified the decree of the first court The present appellants, who were respondents in the court below, object to the decree of the lower appellate court on two grounds They say that interest should not have been allowed on the sum found due to a partner either for the period prior to dissolution or subsequent thereto The second objection is that the cross objection of Niadar Mal that the sum of Rs 550 had not been paid to him by Niadar Singh respondent in the court below should not have been entertained in view of the provisions of order XLI, rule 22, of the Code of Civil Procedure We think that neither of the grounds taken in appeal has any force The lower appellate court allowed interest to all the partners to whom any sum of money was found due from other partners The rate of interest awarded was not high and it is not contended that the lower court had no power to decree interest As to the second objection the case of *Jadunandan Prosad Singh* v *Deo Narain Singh* (1) may be referred to, also the case of *Abdul Ghani* v *Muhammad Fasih* (2) The latter case was decided when the old Code of Civil Procedure was in force It was held that under special circumstances it was competent to an appellate court to allow a respondent to take cross objections against another respondent The Calcutta case was decided under the present Code of Civil Procedure The learned Judges of the Calcutta High Court say that the language of order XLI, rule 22 of the Code of Civil Procedure, is comprehensive enough to admit of cross objections being preferred by one respondent against another As accounts were being taken between all the parties whether plaintiffs or defendants we think that Niadar Mal was entitled to take objections as to the sum of Rs 550, against Niadar Singh who was also a respondent in the case before the lower appellate court The appeal therefore fails and is dismissed with costs There are cross objections on behalf of the plaintiffs respondents which are not pressed and are dismissed with costs.

Appeal dismissed.

(1) (1911) 16 C. W N, 612 (2) (1905) I. L. R, 28 All., 95

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

GUR PRASAD AND ANOTHER (DEFENDANTS) v THE GORAKHPUR BANK LIMITED (PLAINTIFF) AND MAJID HUSAIN KHAN AND ANOTHER (DEFENDANTS)*

1914 May 27

Charge—Fixed deposit—Competence of depositor to charge money on fixed deposit in a bank as security for a loan

It is competent to a person who has money with a banking company on fixed deposit, with the assent of such company, if not without it to assign to any person whom he pleases either absolutely or by way of a charge the debt due or about to become due to him from the banking company *William Brandt s Sons & Co* v *Dunlop Rubber Co*, (1) referred to *Aga Mahomed Jaffer Bindanim* v *Koolsom Beebee* (2) distinguished

THE facts of this case were as follows —

One Majid Husain Khan, who had a sum of money in fixed deposit in the Kayastha Trading and Banking Corporation, Limited, borrowed money from the Gorakhpur Bank, Limited, and wrote them a letter by which he gave them a charge on his fixed deposit with the Kayastha Trading and Banking Corporation This latter company, on Majid Husain Khan's letter being brought to their notice, assented to the charge, merely stating that the sum in their possession on behalf of Majid Husain Khan was less than was stated in the letter Subsequently certain persons who held a decree against Majid Husain Khan attached the fixed deposit The Bank coming to know of this filed objections, which were disallowed. They then brought the present suit for a declaration of their charge on the fixed deposit The court of first instance dismissed the suit The lower appellate court decreed it The attaching decree-holders appealed to the High Court

Mr *M L Agarwala* and Munshi *Govind Prasad*, for the appellants

Babu *Durga Charan Banerji* and Munshi *Iswar Saran*, for the respondents

CHAMIER and MUHAMMAD RAFIQ, JJ —This appeal arises out of a suit brought by the first respondent, the Gorakhpur Bank, Limited for a declaration that it has a charge on the amount of a

* Second Appeal No 913 of 1913 from a decree of Srish Chandra Basu, Additional Judge of Gorakhpur, dated the 6th of June 1913, reversing a decree of Hidayat Ali, officiating Subordinate Judge of Gorakhpur, dated the 12th of December, 1912

(1) (1905) L. R., A. C. 454 (2) (1897) I. L. R., 25 Calc., 9

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GUR PRASAD v. THE GORAKHPUR BANK LD.

fixed deposit standing to the credit of the second respondent Majid Husain Khan in the Kayastha Trading and Banking Corporation, Limited. The facts are that in May, 1910 Majid Husain Khan deposited Rs. 8,700 with the Kayastha Trading and Banking Corporation for three years to bear interest at the rate of 7 per cent per annum. A receipt in the ordinary form was issued to him containing in the margin the words "Not transferable." Majid Husain Khan in 1911 borrowed Rs. 4,650 from the Gorakhpur Bank, Limited, and on that occasion wrote to the Manager of that Bank a letter which is set out in the judgement of the lower appellate court. It purports to authorize the Bank, in case the loan was not repaid, to recover the amount from the sum for the time being standing in Majid Husain Khan's name in fixed deposit account with the Kayastha Trading and Banking Corporation, Limited.

The letter sets out the date and number of the fixed deposit receipt and it is found as a fact that Majid Husain Khan made over the receipt to the Gorakhpur Bank. On the same day the Gorakhpur Bank wrote to the Manager of the Kayastha Trading and Banking Corporation a letter giving notice that they had a charge on the fixed deposit. The Manager of the latter replied by a letter of the same date as follows :—"Dear sir, with reference to your (letter) of the 8th instant we beg to let you know that Majid Husain Khan of Begpur has got only Rs. 5,877 out of his deposit with us. So we have noted your lien on that amount only." From this it appears that a portion of the sum deposited had been withdrawn. In May, 1912, that is a year later, defendants appellants obtained a decree against Majid Husain Khan in the execution of which they caused the balance of the fixed deposit to be attached. The Gorakhpur Bank having come to know of this filed objections. The objections were summarily disallowed and the present suit was then instituted. The court of first instance held that the Gorakhpur Bank had no charge upon the amount under attachment. The Subordinate Judge was apparently of opinion that no one could have a charge on such a deposit unless he was in possession of it. On appeal the Additional Judge, Gorakhpur, reversed this decision and held that a valid charge on the fixed deposit had been created in favour

of the Gorakhpur Bank In second appeal it is again contended that it was impossible for the Gorakhpur Bank to have a charge on this fixed deposit as it was not in possession of the money, and we were referred to the decision of the Privy Council in *Aga Mahomed Jaffer Bindanim* v *Koolsom Beebee* (1) It appears to us that that case has no bearing whatever on the present case In that case some fixed deposit receipts had been handed over by a man to his wife shortly before he died After his death she claimed to be entitled to the amounts mentioned in the receipts It was held that it was a case of an incomplete gift that the effect of handing over the receipts was not to transfer the debts to the wife that she had acquired no title to them and that at most the evidence showed that the testator had intended to make a formal transfer of the deposits to his wife but had died before he was able to do so In the present case we can see no reason why it should not be held that there was what would be called in England an equitable assignment by way of charge of the amount of the fixed deposit to the Gorakhpur Bank The circumstance that the fixed deposit receipt bears the words 'Not transferable' is immaterial, because it is not suggested that any charge on the money is claimed by the Kayastha Trading and Banking Corporation, and the latter distinctly recognized the right of the Gorakhpur Bank to a charge on the balance of the deposit It has been held in many cases that the form of an assignment of this description is of no importance so long as the intention to assign or to make a charge is clear An agreement between a debtor and a creditor that the debt shall be paid out of a specific fund coming to the debtor is a good equitable assignment For example, in the case of *William Brandt's Sons and Company* v *Dunlop Rubber Company, Limited* (2) some merchants had agreed with a Bank by whom they were financed that all goods sold by the merchants should be paid for by a remittance direct from the purchasers to the Bank Goods having been sold by the merchants, the Bank forwarded to the purchasers notice in writing that that the merchants had made over to the Bank the right to receive the purchase money and requested the purchasers to sign an undertaking to remit the purchase money

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(1) (1897) I. L. R., 25 Calc. 9 (2) (1905) L. R. A. C. 454

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to the Bank. It was held that there was a good equitable assignment of the debt to the Bank. It is unnecessary to consider whether the assignment would have been valid if the Kayastha Trading and Banking Corporation had refused to recognize the assignment, for it expressly recognized the assignment. It is quite clear that, with consent of the Banking Corporation, if not without it, Majid Husain Khan was entitled to assign to any person whom he pleased either absolutely or by way of a charge the debt due or about to become due to him, from the Banking Corporation. It seems to us quite clear that in the present case there was an effective transfer of the debt due to Majid Husain Khan in favour of the Gorakhpur Bank by way of a charge. Therefore the Gorakhpur Bank were entitled to a charge on the fixed deposit as against the attaching creditors. The appeal fails and is dismissed with costs.

Appeal dismissed.

1914
May, 27

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

NARAIN DIKSHIT (DEFENDANT) *v.* BINAIK BHAT AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code (1908), order XLI, rule 4—Appeal—Discretion of court—Decree based on ground common to all defendants—Court not bound to set aside decree as against non appellant defendant.

Where an appellate court reverses a decree in favour of a plaintiff upon grounds common to all the defendants, it is not bound to set aside the decree as against a defendant who has not appealed from it. *Seshadri* v. *Krishnan* (1) referred to.

THE facts of this case were as follows:—

The plaintiff sued to recover Rs. 1,939, on the basis of a mortgage executed by one Gajadhar deceased (uncle of defendant No. 1 and grand uncle of defendants Nos. 2 and 3). Defendant No. 1 pleaded that the bond was not genuine and that Gajadhar was not the manager of the family and had no right to alienate joint family property. Defendant No. 4, the minor Maharaja of Ajudhia, pleaded that the piece of land which was alleged to be Gajadhar's was endowed property. The first court gave a decree in favour of the plaintiffs. On appeal by the receiver of the

* Second Appeal No. 489 of 1913 from a decree of G. A. Paterson, District Judge of Benares, dated the 10th of December, 1912, modifying a decree of Ganga Sahai, Additional Subordinate Judge of Benares, dated the 15th of April, 1912.

(1) (1884) I. L. R., 8 Mad., 192.

Ajudhia estate the lower appellate court held that plaintiffs had failed to prove legal necessity and dismissed the suit in so far as it affected the Adjudhia estate. The heir of the mortgagor who was not an appellant before the lower appellate court came up in second appeal.

Pandit *Rama Kant Malaviya* (with the Hon'ble Dr. *Tej Bahadur Sapru*) for the appellant submitted that inasmuch as the court below had come to the conclusion that the plaintiff had failed to prove that Gajadhar had any valid legal necessity for borrowing the money, and had passed the decree on a ground common to all the defendants the suit ought to have been dismissed *in toto*. He referred to *Kulaikada Pillai* v. *Viswanatha Pillai* (1) *Abdul Rahiman* v. *Maidin Saiba* (2) *Mul Chand* v. *Ram Ratan* (3), *Intu Meah* v. *Dar Baksh Bhuiyan* (4) and *Seshadri* v. *Krishnan* (5).

Babu *Lalit Mohan Banerji* for the defendants submitted that the defendant's appeal did not fall within the purview of section 100 of the Code of Civil Procedure. Narayan Dikshit did not appeal from the decree of the court of first instance. The other defendants tried to set up a new case in the lower appellate court as Narayan Dikshit had tried to set up a case quite defferent to that set up by him in his written statement.

CHAMIER and MUHAMMAD RAFIQ JJ.—This appeal arises out of a suit upon a mortgage. The plaintiff was the son of the mortgagee. Defendants 1 and 2 were the nephew and grand nephew of the mortgagor. Defendants 4 and 5 were representatives of the late Maharaja of Ajudhia to whom part of the mortgaged property was transferred by the mortgagor after the mortgage. Defendants 6, 7, 8 and 10 were impleaded as trustees of part of the property under a deed of endowment executed by the Maharaja.

Defendant 1 pleaded that there was no legal necessity for the mortgage, and the same plea among many others, was put forward by defendants 6 and 10.

The Subordinate Judge decreed the claim holding that legal necessity for the mortgage had been proved.

(1) (1904) I. L. R., 28 Mad., 229. (3) (1898) I. L. R. 20 All., 423.
(2) (1896) I. L. R., 22 Bom., 500. (4) (1911) 15 C. W. N., 798.
(5) (1884) I. L. R., 8 Mad., 192.

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NARAIN DIKSHIT v. BINAIK BHAT

Defendants 5 and 10 appealed separately to the District Judge, who allowed both appeals, holding that legal necessity for the mortgage had not been established. The learned Judge dismissed the suit with costs so far as it related to the property in possession of the appellants before him. Defendant 1, who was a respondent in the court of the District Judge, contended that the suit should be dismissed altogether, but the District Judge expressly declined to do this

Defendant 1 has appealed to this Court. As he did not appeal to the lower appellate court it is doubtful whether he has any right of appeal to this Court. We will assume, however, that he is entitled to appeal It is urged, on his behalf, that inasmuch as the decree of the court of first instance proceeded on a ground common to all the defendants, i e, that the mortgage was made for legal necessity, the District Judge on holding that legal necessity had not been made out was bound to reverse the decree in favour of all the defendants Order XLI, rule 4 provides that the appellate court in such a case *may* reverse or vary the decree in favour of all the defendants The use of the word *may* shows in our opinion that the appellate court is given a discretion in the matter It may be that a wholly unreasonable and indefeasible exercise of this discretion might be a good ground for a second appeal But we need not decide that, for the District Judge has considered the question and has given his reason for refusing to reverse the decree in favour of all the defendants and we are unable to say that his decision is unreasonable We must, therefore, decline to interfere The view which we have taken seems to be supported by the remarks of the Madras High Court in *Seshadri* v *Krishnan* (1) The appeal is dismissed with costs

Appeal dismissed

(1) (1884) I L. R, 8 Mad, 192

REVISIONAL CRIMINAL

1914
May 27

Before Mr Justice Piggott

EMPEROR *v* NATHI MAL *

Criminal Procedure Code section 528—Transfer—Effect of appointment of a Magistrate to be chairman of a municipal board

Held that when a magistrate is appointed to the post of chairman of a municipal board and has taken over charge he thereby becomes divested of his ordinary functions as a magistrate or if he retains any he is no longer a magistrate subordinate to the District Magistrate within the purview of section 528 of the Code of Criminal Procedure

AN officer who had been a magistrate exercising first class magisterial powers in the district of Cawnpore, was appointed by Government to be chairman of the Cawnpore municipal board. After his appointment the District Magistrate, purporting to act under section 528 of the Code of Criminal Procedure transferred to him a criminal case against one Nathi Mal pending in the court of another magistrate of the district. Against this order of transfer Nathi Mal applied in revision to the High Court.

Mr *E A Howard* for the applicant submitted that the provisions of section 528 of the Code of Criminal Procedure had been distorted to meet the wishes of the District Magistrate Magistrate is defined as a magistrate who is exercising the powers of a magistrate Mr Williamson who was exercising no magisterial powers was not a magistrate under the Code of Criminal Procedure Even assuming that Mr Williamson was a magistrate he certainly was not a Magistrate subordinate to the District Magistrate

The Assistant Government Advocate (Mr *R Malcomson*) contended that Mr Williamson having been invested with first class powers under section 12 of the Code of Criminal Procedure, his transfer to the chairman of the municipality could not divest him of the powers

PIGGOTT, J —The District Magistrate of Cawnpore has for certain reasons given in his order transferred a criminal case pending in the court of Mr J N G Johnston, Joint Magistrate of Cawnpore, for trial by Mr R. H. Williamson, chairman of

* Criminal Revision No. 310 of 1914 from an order of H. G S. Tyler District Magistrate of Cawnpore dated the 21st of April, 1914

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EMPEROR v NATHI MAL

municipal board, Cawnpore I have no doubt that when Mr R H Williamson was gazetted to the office of chairman of the municipal board, and took charge of that office, he was thereby divested of his territorial jurisdiction as magistrate 1st class, attached to the Cawnpore district Even if it could be contended that Mr Williamson continued to be a magistrate of some sort while holding the office of chairman municipal board, I am quite clear that he is not a magistrate subordinate to the District Magistrate The order complained of cannot be sustained It is therefore set aside

Order set aside

1914
May, 28

APPELLATE CIVIL

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

DEBI SARAN TIWARI v GUPTAR TIWARI (OPPOSITE PARTY) (APPLICANT)*

Pre-emption—Suit decreed—Pre emptive price enhanced on appeal by vendee but no time fixed for payment—Practice

The appellate court in a pre emption suit enhanced the amount decreed to be payable by the pre emptor in the first court, but omitted to fix any time within which the enhanced amount should be payable.

Held that the plaintiff pre emptor was entitled to a reasonable time within which to pay in the amount decreed and that having regard to the enhanced amount (Rs 801) the time within which it was in fact paid (one month and one day after the decree) was reasonable and the plaintiff was entitled to execute his decree

THE plaintiff in this case obtained a decree for pre emption of certain property on payment of Rs 999, which sum was deposited in court within the time prescribed by the decree The vendee, however, appealed as to the amount of consideration, and the appellate court directed the plaintiff pre emptor to pay in a further sum of Rs 801, but omitted to fix any time within which this further sum was to be paid The plaintiff paid in the further amount a month and a day from the date of the decree and asked for possession of the property This application was however, dismissed and the order of dismissal was confirmed on appeal The plaintiff thereupon appealed to the High Court

Mr *M. L Agarwala*, for the appellant.

The Hon ble Dr *Tej Bahadur Sapru*, for the respondent.

*Second Appeal No 1390 of 1913, from a decree of Hidayat Ali, Subordinate Judge of Gorakhpur, dated the 22nd of August, 1913 confirming a decree of Raj Rajeshwar Sahai, Munsif of Basti, dated the 17th of May, 1913

1914

DEBI SARAN TIWARI v. GUPTAR TIWARI

RICHARDS C J and TUDBALL J —This is an execution case arising out of a pre emption suit The real facts seem to have been that the court of first instance decreed the plaintiff's suit subject to his making a payment of Rs 999 Rs 24 out of which should be paid to the vendee The Munsif's decree was not strictly in accordance with the judgement We are however not concerned with that now He subsequently amended it Whether he had power to do so we need not decide The vendee appealed complaining that the consideration allowed ought to be more than that decreed by the court of first instance Mr Rose by his judgement directed that he (the pre emptor) should deposit the further sum of Rs 825 including the Rs 24 directed by the first court This was really in addition to the money payable to the prior mortgagee No time was mentioned when this Rs 801 should be paid. The decree which was made was a simple dismissal of the appeal obviously not in accordance with the judgement and drawn up in a grossly careless way The pre emptor in a month and one day after the decree paid the Rs 801, into court and then claimed possession of the property The court to whom application was made for execution of the decree refused to order possession holding that as the money was not paid within the time allowed by the court of first instance, the applicant was not entitled to execution It was an absolute impossibility for the pre emptor to pay the sum of Rs 801 at the time allowed by the court of first instance because it was not until the 12th of April, 1912 that any court had directed that he should pay this sum and the time allowed by the first court expired on the 4th of April, 1912 The matter therefore stands thus The court has not limited any time within which the Rs 801 should be paid. The pre emptor certainly paid it within a reasonable time after he was ordered to pay it Under the circumstances of the case we think material justice requires that the plaintiff should be entitled to execute his decree We accordingly set aside the decrees of both the courts below, and order that the application should be restored to its original number on the file of the first court and determined according to law having regard to what we have said above The appellant will have his costs.

Appeal decreed

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott.

1914
May, 26

SARDAR SINGH AND OTHERS (PLAINTIFFS). *v.* RATAN LAL (DEFENDANT)*

Act No. IV of 1882 (Transfer of Property Act), section 99—Civil Procedure Code (1908), order XXXIV, rule 14—Hindu law—Joint Hindu family—Mortgage by father alone—Suit on mortgage ending in money decree—Sale of mortgaged property in execution—Suit by sons for redemption.

One N. S, the father and managing member of a joint Hindu family, executed a simple mortgage of joint family property in favour of R L R L brought a suit for sale on this mortgage against N S. alone, not impleading his sons, but in that suit he released the security and took a simple money decree against N S, in execution of which he attached and brought to sale the mortgaged property and purchased it himself The sons of N. S. neither objected to the pasing of the decree against their father nor to the sale of the property, but subsequently filed a suit against R for redemption of the mortgage.

Held that the mortgagee could not, by taking a simple money decree for his debt and bringing the mortgaged property to sale in execution of such decree, divest himself of his character as a mortgagee, and that the sons of the mortgagor, not having been made parties to the original suit for sale, were still entitled to sue for redemption of the mortgage made by their father. *Majan Pathuti* v. *Pakuran* (1), *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni* (2), *Pancham Lal Chowdhury* v *Kishun Pershad Misser* (3) and *Khiarajmal* v *Daim* (4) referred to. *Debi Singh* v. *Jia Ram* (5), *Tara Chand* v *Imdad Husain* (6), *Parmanand* v *Daulat Ram* (7) *Banh Bal* v *Manni Lal* (8), *Muhammad Abdul Rashid Khan* v *Dilsukh Rai* (9), *Kishan Lal* v. *Umrao Singh* (10) and *Muthu* v *Karuppan* (11) distinguished

THE facts of the case were as follows:—

On the 28th of September, 1893, Nandan Singh, father of the plaintiffs, executed a mortgage in favour of Ratan Lal. The latter brought a suit in 1898 against Nandan Singh, but prayed only for a simple money decree, which he obtained on the 13th of September, 1898, and in execution of which he attached and brought to sale the mortgaged property and purchased it himself. The sons of Nandan Singh brought the present suit to redeem the mortgage of the 28th of September, 1893, on the ground that the right to redeem was not extinguished and they had not been parties to the original suit.

* Second Appeal No 290 of 1913, from a decree of I. B. Mundle, Additional Judge of Bareilly, dated the 12th of December, 1912, reversing a decree of Pirthwi Nath, Subordinate Judge of Bareilly, dated the 20th of March, 1912

(1) (1899) I L R., 22 Mad., 347.
(2) (1897) I. L. R., 22 Bom, 624
(3) (1910) 14 C. W N, 579.
(4) (1905) I. L R, 32 Calc, 296.
(5) (1902) I L. R., 25 All., 214.
(6) (1896) I. L. R, 18 All., 325.
(7) (1902) I. L. R, 24 All., 549.
(8) (1905) I. L. R., 27 All., 450.
(9) (1905) I. L. R., 27 All., 517.
(10) (1908) I. L. R., 30 All., 146.
(11) (1907) 17 M. L. J., 163.

The first court decreed the claim subject to payment of the mortgage money *plus* interest up to the date of sale The lower appellate court allowed the appeal and dismissed the suit The plaintiffs appealed to the High Court

Babu *Sital Prasad Ghosh*, for the appellant submitted that the father of the plaintiffs as manager had executed a mortgage of ancestral property and the sons as interested in that property had a right to redeem the mortgage The defendant must show that the right of the sons to redeem had been extinguished The suit brought against the father and the decree thereon had not the result of extinguishing the equity of redemption, because there was no decree giving the plaintiff's father a right to redeem on failure of which the right would be extinguished The sale at which the defendant purchased the property was a sale in contravention of section 99 of the Transfer of Property Act and could not vest the full proprietary right in the defendant The plaintiffs in the present suit were not repudiating the mortgage which was made by their father but accepting it were suing to enforce their right to redeem. The defendant mortgagee could not, by violating the provisions of the law and by purchasing the property in violation of section 99 of the Transfer of Property Act, by his own act deprive the sons of their right to redeem He relied on *Khiarajmal* v *Daim* (1) *Jhabba Lal* v *Chhajju Mal* (2), *Mayan Pathuti* v *Pakuran* (3) and Ghose on Mortgages, page 375

Babu *Lalit Mohan Banerji* (with him Babu *Piari Lal Banerji*), for the respondent urged that the real question was what was the effect of the suit of 1898 and the decree and sale which followed. If as a result of the decree and the sale the plaintiffs' father's right to redeem was extinguished, then the right of the sons also was extinguished, because the father sufficiently represented the sons for all purposes according to the recent decision of the full Bench of this Court, *Hori Lal* v *Munman Kuwar* (4) When in execution the property was attached the father had an opportunity to object, and the omission of the father to object estopped him and all those whose interest he sufficiently represented,

(1) (1905) I L R, 32 Calc., 290.

(2) (1909) 4 A L J, 787

(3) (1899) I L R, 22 Mad., 347

(4) (1912) I L R, 34 All., 549

namely, his sons the present plaintiffs. The sale, therefore, had the result of vesting the full proprietary right in the defendant and the sons could not raise questions which could and ought to have been raised before the sale had been confirmed It was settled law that a sale, even though in contravention of section 99 of the Transfer of Property Act, was not a nullity, and if confirmed could not be set aside, *Kishan Lal* v *Umrao Singh* (1) *Ashutosh Sikdar* v *Behari Lal Kirtania* (2) and *Thaleri Pathamma* v *Thandora Mammad* (3)

The sale not being capable of being set aside now, the plaintiffs could not exercise their right to redeem by reason of the failure of their father to set up such a claim The right to redeem had therefore been extinguished.

There was another aspect of the case. The sons here were seeking to recover property which had passed out of the family, and they must, according to the law laid down by this Court, show that the transaction by means of which the property passed out was immoral or otherwise not binding on them. The property had passed out of the family by means of the auction sale held in execution of the decree obtained against the father That constituted a debt binding on the father which was not immoral or illegal and the sons were bound by the sale unless they could show that the decree was for an immoral debt The sons were seeking to avoid the sale, because, if the sale stood, the position of the defendant was not that of a mortgagee but one of a full and absolute owner

Babu *Sital Prasad Ghosh* was not heard in reply.

MUHAMMAD RAFIQ, J —This case has been referred to a Bench of two Judges, as when it came up before a learned Judge of this Court it was stated that, whatever his decision might be, an appeal would be preferred under the Letters Patent

The question raised in the appeal is whether the sons who formed a joint Hindu family with their father can sue to redeem the property belonging to the joint family, which has been sold and purchased by the mortgagee at a court sale in execution of a decree obtained against the father in a suit on a mortgage bond given

(1) (1908) I L. R., 30 All, 146 (2) (1907) I L. R, 35 Calc, 61

(3) (1900) 10 M. L J., 110

by the father, but where the security of the property was released and a simple money decree asked for and granted. The facts which led to the present appeal and the points under discussion are as follows. The plaintiffs appellants and their father Nandan Singh were members of a joint undivided Hindu family. On the 28th of September, 1893, Nandan Singh alone executed a deed of simple mortgage in favour of one Ratan Lal in lieu of Rs. 99, in respect of some of the joint family property. Ratan Lal brought a suit on foot of his mortgage against Nandan Singh only. He did not implead the sons of the latter, and, releasing the security of the property, asked for a simple money decree, which was passed in his favour on the 13th of September, 1898. In execution of his decree Ratan Lal attached the mortgaged property, as also some other property of the joint family, on the 7th of November, 1898. Both the attached properties were sold on the 22nd of August, 1899. Ratan Lal bought the mortgaged property, and the other property was purchased by a stranger at the court sale. On the 26th of September, 1899, the sale in favour of Ratan Lal was confirmed. On the 21st of August, 1911, the plaintiffs appellants, the sons of Nandan Singh, instituted the suit which has given rise to the present appeal in the court of the Subordinate Judge of Bareilly for redemption of the mortgage of the 28th of September, 1893. They based their claim on the allegation that they and their father were members of a joint undivided Hindu family; that the property sought to be redeemed was joint family property; that they were no parties to the decree of the 13th of September, 1898, and that the sale to Ratan Lal was voidable in view of section 99 of Act IV of 1882. They further stated that they had asked Ratan Lal several times out of court to allow redemption and render an account of the property since his possession as a purchaser, but he had declined to accede to their request. The cause of action accrued to the plaintiffs on the 1st of August, 1911, the date of the last refusal of Ratan Lal, and therefore they sued for redemption of the mortgage of the 28th of September, 1893, on the payment of Rs. 158, or whatever sum the court found due and for mesne profits on a rendition of accounts by Ratan Lal since his possession over the property. Ratan Lal resisted the claim on various pleas. He said that there was no subsisting mortgage capable of redemption; that the sale in

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his favour was valid, that it could not be impeached after confirmation, that section 99 of Act IV of 1882 was inapplicable, that there was a prior mortgage in favour of a third party which should also be paid off, and that a much larger sum than that offered by the plaintiffs was due on the mortgage of the 28th of September 1893 The learned Subordinate Judge decreed the claim. On appeal by Ratan Lal the decree of the first court was set aside and the claim of the plaint ffs was dismissed. The learned Additional Judge found against the plaintiffs on the ground that their father being the *karta* of the family executed the mortgage of the 28th of September, 1893 in his representative capacity and the decree of Ratan Lal was passed against him in that capacity and as he Nandan Singh had not objected to the sale and allowed it to be confirmed he must be taken to have waived his rights The plaintiffs' have come up in second appeal to this Court They contend that the learned Additional Judge did not appreciate the real issue in the case and misapplied the law of waiver or estoppel

The fact that the mortgage was given by Nandan Singh or that the decree was passed against him in his capacity as *karta* of the family does not affect the merits of the present case, nor does his silence in the execution proceedings of 1899 amount to a waiver or estop his sons from bringing the present suit for redemption The real issue in the case is not the status of Nandan Singh or the effect of his silence in the execution proceedings of 1899 but whether a mortgagee can by obtaining a money decree for a mortgage-debt and purchasing the equity of redemption in execution of that decree relieve himself of his obligations as mortgagee and deprive the mortgagor of his right to redeem. It is argued for the plaintiffs appellants that the mortgagee cannot do so in view of the provisions of section 99 of Act IV of 1882 In support of his contentions the learned counsel for the plaintiffs appellants relies on the following cases —*Mayan Pathuti* v *Pakuran* (1), *Martand Balkrishna Bhat* v *Dhondo Damodar Kulkarni* (2) *Pancham Lal Chowdhury* v *Kishun Pershad Misser* (3) *Khiarajmal* v *Daim* (4)

(1) (1898) I L R 22 Mad., 347
(2) (1897) I L R 22 Bom 624
(3) (1910) 14 C W N 579
(4) (1905) I. L. R 32 Calc 296.

In the Madras case the facts were that a mortgagee in execution of a simple money decree against the mortgagors sold the mortgaged property subject to his mortgage and purchased it himself. The mortgagors brought a regular suit to have the sale set aside on the ground that it was in contravention of the provisions of section 99, Act IV of 1882 The defence of the mortgagee was that a regular suit for the cancellation of the sale was not maintainable, as the question whether the sale was liable to be set aside or not was one relating to the execution, discharge or satisfaction of the decree and should have been raised and could only be raised and decided in the execution proceedings The learned Judges of the Madras High Court accepted the plea in defence and held that the suit of the mortgagors was not maintainable But they further held that in spite of the confirmation of the sale and the fact that a suit to set it aside did not lie, the mortgagors were not precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale

In the Bombay case three persons, viz, Shankarji, his son and grandson, formed a joint undivided Hindu family Shankarji executed a usufructuary mortgage in favour of one Hamir Mul in respect of some of the joint family property After the death of the mortgagor Hamir Mul, in execution of a simple money decree for a debt other than the mortgage debt sold the mortgaged property and purchased it *benami* in the name of his dependants The grandson of Shankarji sued to redeem the mortgaged property, on the ground that the sale was *benami* for Hamir Mul and contravened the law laid down by section 99 of Act IV of 1882 The claim was resisted on the ground that no objection had been taken to the sale and therefore the sale was valid. The plea in defence was disallowed and it was held that the mortgagee could not by such sale and purchase free himself from the liability to be redeemed The learned Chief Justice who decided the case referred to the proposition of law laid down in the case of *Bhuggobutty Dossee* v *Shamachurn Bose* (1) The proposition was that ' a mortgagee is not entitled by means of a money decree obtained on a collateral security, such as a bond or covenant,

(1) (1876) I. L. R., 1 Calc., 337

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to obtain a sale of the equity of redemption, separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a court of equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it, to do that circuitously which he could not do directly" "That is the principle', the learned Chief Justice went on to say, 'which, in an extended form is enacted as law in section 99 of the Transfer of Property Act' It should be observed here that the learned Chief Justice of the Bombay High Court referred to the principle of equity in support of his decision, as the sale objected to had taken place before the passing of Act IV of 1882

In the case of *Pancham Lal Chowdhury* v *Kishun Prasad Misser* (1) the facts were that a mortgagee obtained a simple money decree on the basis of a hand note In execution of that decree he sold the mortgaged property subject to the mortgage and himself purchased it He obtained mutation of names in his favour and no objection was taken on behalf of the mortgagor The sons of the mortgagor sued for redemption of the mortgage The claim was resisted on the grounds that their father had waived his rights by acquiescence in the sale, and that they could not ask for redemption without having the sale first set aside It was held that it was a well established principle that a purchase by a mortgagee of the equity of redemption in execution of a simple money decree, constitutes him a trustee for the mortgagor and that he does not unless there is a release of the equity of redemption or other circumstance which in law barred the right of redemption, acquire an irredeemable title It was further held that the mortgagor was under no necessity to have the sale set aside before he could sue for redemption He could sue for redemption within the period of limitation allowed by law The plea of waiver was also disallowed

The facts of *Kharajmal* v *Daim* (2) were complicated and it would serve no useful purpose to recite them in detail here It is sufficient to refer to the principle approved of by their Lordships,

(1) (1910) 14 C W N, 579 (2) (1904) I. L R, 32 Calc, 296.

which bears directly on the point under discussion Their Lordships are reported to have said at page 316 of the Report that they throw no doubt on the principle which has been acted on in many cases in India that a mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption, in execution, relieve himself of his obligation as a mortgagee or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on the mortgage" It will be observed that their Lordships have stated the principle in less general and more guarded language than that used in the Calcutta and Bombay cases and limit its scope to the case of a mortgagee who obtains a simple money decree in respect of his mortgage debt and in execution of that decree sells and purchases the equity of redemption The provisions of section 99 went further than the principle approved of by their Lordships The law as enacted in the Transfer of Property Act has been altered and brought into consonance with the principle enunciated by their Lordships in *Daim's case* vide order XXXIV, rule 14 of the Code of Civil Procedure In the present case, however, the mortgaged property was sold and purchased by the mortgagee in execution of a simple money decree obtained for the mortgage-debt The alteration in the law does not, therefore, affect the issue between the parties to this case It is clear from the authorities just discussed that the appellants can redeem the property purchased by Ratan Lal in execution of his simple money decree for the mortgage debt

But the respondent argues that the law under which the appellants claim redemption, viz, section 99 of Act IV of 1882 or, to be more accurate, order XXXIV, rule 14, is inapplicable to the present case, for three reasons First, the sale of joint family property held against a Hindu father can be avoided by the sons to the extent of their shares only, if they were no parties to the decree and the debt for which the decree was passed was such that under the Hindu law they were not bound to pay it. In support of this reason the case of *Debi Singh* v *Jia Ram* (1) is referred to. Secondly, a sale of the mortgaged property, once confirmed though in favour of a mortgagee and held in execution of

(1) (1902) I. L. R., 25 All., 214.

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a simple money decree obtained for the mortgage debt cannot be subsequently questioned and set aside at the instance of the mortgagor or his sons And thirdly, that the failure of the mortgagor to object to the sale before its confirmation amounts to a waiver of the benefit given by the law, and he or any other member of the joint family is estopped from challenging the sale In support of the last two reasons the following cases are relied upon —*Tara Chand* v *Imdad Husain* (1), *Parmanand* v *Daulat Ram* (2) *Banh Bal* v *Manni Lal* (3) *Muhammad Abdul Rashid Khan* v *Dilsukh Rai* (4) and *Kishan Lal* v *Umrao Singh* (5) I shall discuss the three objections urged on behalf of the respondent in their order

The rule of Hindu law alleged by the respondent that the sons in a joint Hindu family can avoid a decree passed against their father, only on the grounds that they were no parties to the decree and that the debt for which the decree was passed was such that they were not under the Hindu law bound to discharge it has no application to the present case In the present case the sons are not seeking to evade the payment of their father s debt They are offering to discharge the mortgage, that is to pay the debt contracted by their father They want to avail themselves of the provisions of a law that gives them the right to redeem under certain circumstances, in spite of the sale of the joint family property in execution of a decree against the father The first objection of the respondent has therefore no force

The first case in support of the second objection is that of *Tara Chand* v *Imdad Husain* (1) In that case one Imdad Husain mortgaged with possession his zamindari property and his share in a house to one Dwarka Das The latter then leased the mortgaged lands to Muhammad Husain who fell into arrears with his rent Dwarka Das obtained a decree for arrears of rent and in execution of his decree had the share of the house mortgaged sold One Tara Chand purchased the said share in the house and then sued in a Civil Court for partition of the share purchased by him Muhammad Husain resisted the suit on the ground that the

(1) (1896) I L R 18 All 325 (3) (1905) I L R., 27 All. 450
(2) (1902) I L R 24 All 549 (4) (1905) I L R 27 All., 517
(5) (1908) I. L R 30 All., 146

sale of the share of the house in suit was in contravention of section 99 of Act IV of 1882 It was held that Muhammad Husain could not dispute the validity of the sale in the civil suit brought by the purchaser for partition In the case of *Parmanand* v *Daulat Ram* (1) the purchase by the mortgagee was under a decree obtained under section 67 of Act IV of 1882 It was held that a sale under such a decree did not offend against the law enacted in section 99 of Act IV of 1882.

In the case of *Banh Bal* v *Manni Lal* (2) a mortgagee obtained a simple money decree in respect of a debt other than the mortgage debt He then transferred the decree to a third party The latter in execution of the decree sought to sell the equity of redemption of the mortgagor who objected on the basis of the provisions of section 99 Act IV of 1882 The objection was disallowed on the ground that section 99 of Act IV of 1882 did not preclude a third party from bringing to sale the equity of redemption of the mortgagor

The facts of the case of *Muhammad Abdul Rashid Khan* v *Dilsukh Rai* (3) were somewhat complicated and need not be reproduced here in detail The main facts were that one Ram Bakhsh executed a mortgage in respect of certain property in 1863 in favour of one Debi Das Subsequent to the mortgage, Ram Bakhsh sold his equity of redemption to third parties After the sale of the equity of redemption Debi Das in execution of a decree for costs and mesne profits brought the equity of redemption in the hands of the purchasers to sale and bought it himself About 20 years after, the purchasers of the equity of redemption sued to redeem the mortgaged property treating the sale to the mortgagee as a nullity They failed to implead some of the necessary parties It was held that the suit must fail for want of proper parties, and that the sale to the mortgagee was not void but voidable and could not after the lapse of 20 years be impeached.

The facts of the case of *Kishan Lal* v *Umrao Singh* (4) were as follows One Umrao Singh gave a mortgage to one Kishan Lal The latter brought a suit on foot of his mortgage, but abandoned his security and asked for a simple money decree, which

(1) (1902) I L R 24 All 549
(2) (1905) I L R 27 All 450
(3) (1905) I L R 27 All 517
(4) (1908) I L R 30 All 146

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was granted The decree holder then assigned the decree to another person whose name was also Kishan Lal The assignee in execution of the decree sold and purchased the mortgaged property The mortgagor applied under section 311 of the Code of Civil Procedure (old) to have the sale set aside but was unsuccessful and the sale was confirmed About three years after the mortgagor again applied to have the sale set aside on the ground that it was held in contravention of section 99 of Act IV of 1882 His application was rejected by the first court, but allowed by the Judge On appeal to this Court the order of the first court was restored It was held that the sale objected to had taken place and had been confirmed to the knowledge of the mortgagor, and he could not after the lapse of three years from confirmation question it and defeat the title of the purchaser on the ground that the court executing the decree ought not to have allowed the sale in violation of section 99 of Act IV of 1882

The only case that bears on the point is that of *Muhammad Abdul Rashid Khan* v *Dilsukh Rai* (1) In that case a suit for redemption was brought after a sale in violation of section 99 of Act IV of 1882 had taken place and had been confirmed. The claim in that case was disallowed for three main reasons, as would appear on a perusal of the report of the case The reasons were that the sale objected to had taken place prior to the passing of the Transfer of Property Act, that the disqualification of the mortgagee to purchase the equity of redemption was limited to a case where he became the purchaser in execution of a simple money decree obtained for the mortgage debt and that proper parties had not been impleaded

Now in the present case none of these reasons holds good. The sale in the present case took place long after the passing of the Transfer of Property Act and it was held in execution of a decree obtained for the mortgage debt. There is no question as to the omission of any necessary parties The case of *Abdul Rashid Khan* is not therefore of any assistance to the respondent The case reported in 24 All is not in point at all In that case the sale took place in execution of a decree obtained under section 67 of Act IV of 1882

(1) (1905) I. L. R., 27 All., 517

The other three cases viz, 18 All, 325, 27 All, 450 and 30 All, 146, are distinguishable on the ground that the sale in those cases was not in favour of the mortgagee but of a third party. The law as enacted in section 99 of Act IV of 1882 does not preclude a third party a person other than the mortgagee, whether an assignee of the decree from the mortgagee or a complete stranger from purchasing the equity of redemption in execution of a money decree obtained by the mortgage or any other debt.

In the case of *Muthu* v. *Karuppan* (1) it was laid down that "a sale in contravention of section 99 of Act IV of 1882 is not void but voidable only, and when the mortgagee himself becomes the purchaser he cannot by such sale and purchase free himself from his liability to be redeemed. But this equity does not arise against a stranger, auction purchaser. Moreover the three cases in question did not lay down that a mortgagor could not sue to redeem after a sale in contravention of section 99 of Act IV of 1882 had been confirmed. On the other hand there is distinct authority for the proposition that he need not seek to have the sale set aside and can sue for redemption *vide* I. L. R., 22 Mad., 347, 14 C. W. N. 579-583. The second objection for the respondent therefore fails.

The third objection is based on the silence of Nandan Singh, his failure to object to the sale. It is said that as he did not choose to object to the sale he must be taken to have waived the right given to him by the law and if he waived his right to object to the sale on the ground of section 99 of Act IV of 1882 his sons the plaintiffs appellants cannot avail themselves now of the benefit of that section. The passage reported at page 149 of I. L. R. 30 All. is relied upon in support of this contention. The passage is as follows:—"What we have to decide is whether, the order for sale having been passed to the knowledge of the judgement-debtor and having been allowed by him to become final he can now, at this late stage, have the sale set aside and the purchaser divested of his title on the ground that the court ought not to have ordered the property to be sold. In our opinion the decree of the court of first instance is right." The first court disallowed

(1) (1907) 17 M. L. J. 163

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the application of the mortgagors on the ground that it was made too late. I do not think that this passage is an authority for the proposition that the silence of Nandan Singh, in the execution proceedings, amounts to a waiver of the benefit given by section 99 of Act IV of 1882 to a mortgagor or that if it were it would bind and estop his sons from availing themselves of that benefit. Moreover the silence or laches of a mortgagor may defeat his objection to sale and yet not deprive him of his right to sue for redemption. I would again refer to the case of *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (1), where the point was raised and decided against the mortgagee purchaser. In that case the mortgagor had not only kept silent but had accepted the validity of the execution proceedings against the mortgaged property. In disposing of the plea of acquiescence the learned Judge referred to a remark made by their Lordships of the Privy Council in the case of *Khiarajmal* v. *Daim* (2). The remark was that "neither exclusive possession by the mortgagee for any length of time, short of the statutory period of 60 years, nor any acquiescence by the mortgagor, not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." The third objection for the respondent, therefore, fails also.

I would, therefore, allow the appeal and set aside the decree of the lower appellate court. But as that court disposed of the appeal on a preliminary point and did not decide the other points raised in the appeal before it, I would remand the case to that court for disposal according to law.

PIGGOTT, J—I concur.

BY THE COURT.—The order of the Court is that this appeal is allowed, the order of the lower appellate court is set aside, and the appeal is remanded to it for disposal according to law. Costs will abide the event.

Appeal decreed and cause remanded.

(1) (1910) 14 C. W. N., 579. (2) (1904) I. L. R., 32 Calc., 296.

APPELLATE CIVIL

1914
June 1

Before Sir Henry Richards Knight Chief Justice, and Mr Justice Tudball

MUHAMMAD NAJIB ULLAH (PLAINTIFF) v JAI NARAIN AND ANOTHER (DEFENDANTS)*

Execution of decree—Sale in execution—Failure of judgement debtor's title—Suit for refund of purchase money—Procedure

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree on the ground that at the time of sale the judgement-debtor had no saleable interest therein it is competent to him to proceed by way of a regular suit, and he is not confined to the special remedy provided by the Code of Civil Procedure. *Munna Singh* v *Gajadhar Singh* (1) followed but doubted *Kishun Lal* v *Muhammad Safdar Ali Khan* (2), *Sidheswari Prasad Narain Singh* v *Goshain Mayanand* (3) and *Dorab Ally Khan* v *Abdul Azeez* (4) referred to.

THE facts of this case were as follows:—

On the 14th of October 1887, one Chattar Singh executed a mortgage in favour of Ram Saran Das, the father of Jai Narain In 1892 a decree for sale was obtained on this mortgage. In 1910 certain property was sold in execution of this decree and purchased by Muhammad Najib ullah The sale was confirmed in due course and the auction purchaser put into formal possession When, however, he applied for mutation it was found that Chattar Singh had already sold the property under two sale deeds, dated respectively the 17th of September, 1880, and the 23rd of June, 1886. Mutation was refused and the auction purchaser then sued for the recovery of the price paid The court of first instance found that the suit lay and that the judgement debtor had no saleable interest, and granted the plaintiff a decree. On appeal by the defendant Jai Narain the lower appellate court held that the suit was not maintainable and dismissed it The plaintiff appealed to the High Court

Mr *Muhammad Ishaq Khan*, for the appellant.

The Hon'ble Dr *Tej Bahadur Sapru* for the respondent.

*Second Appeal No 1172 of 1913, from a decree of A. W R. Cole, First Additional Judge of Aligarh, dated the 28th of July, 1913, reversing a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 17th of March, 1913

(1) (1883) I L. R , 5 All., 577

(2) (1891) I L. R 13 All , 383.

(3) (1913) I L. R., 35 All , 419, 11 A. L. J , 606

(4) (1878) L. R., 5 I A., 126

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MUHAMMAD NAJIB-ULLAH v. JAI NARAIN

RICHARDS C J and TUDBALL J —This appeal arises out of suit brought under the following circumstances On the 14th of October, 1887 a mortgage was executed by Chattar Singh the defendant No 2 in favour of Ram Saran Das, father of the defendant Jai Narain A decree was obtained on foot of this mortgage in the year 1892 Certain property was sold in execution of that decree on the 26th of November, 1910 and purchased by the plaintiff How it was that the decree remained under execution for this protracted period is not explained The sale was confirmed and plaintiff was put into formal possession He then alleges that he applied for mutation when it appeared from a report of the Kanungo that Chattar Singh had already sold the property under two sale deeds dated respectively the 17th of September 1880 and the 23rd of June, 1886 Mutation was refused and thereupon the present suit was instituted It is not shown that the plaintiff was in any way opposed by the vendees under the two sale deeds or their representatives Various pleas were taken It was alleged that the judgement debtor had a saleable interest and it was contended that the suit did not lie The court of first instance found that the judgement debtor had no saleable interest and the suit lay and granted the plaintiff a decree Upon what ground the court of first instance came to the conclusion that the judgement debtor had no saleable interest does not appear from the judgement beyond the fact that the two sale deeds were proved The defendant No 1 Jai Narain appealed, and the lower appellate court allowed the appeal and set aside the decree of the court of first instance It held that the suit was not maintainable but left undecided the issue whether or not the judgement debtor had any saleable interest' The plaintiff has appealed and contends that the lower appellate court was wrong in deciding that the suit was not maintainable and his learned counsel relies on the Full Bench decision of *Munna Singh* v *Gajadhar Singh* (1) and also on the case of *Kishun Lal* v *Muhammad Safdar Ali Khan* (2) which followed with hesitation the Full Bench case Apart from these decisions we should have some difficulty in holding that a suit like the present can be maintained It seems to us that apart from the provisions of the Code of Civil Procedure, a suit to

(1) (1883) I L R, 5 All. 577 (2) (1891) I L R 13 All 383

re over ba k the purchase money by an auction purchaser does not lie See remarks of their Lordships of the Privy Council in *Dorab Ally Khan* v *Abdul Azeez* (1) In the absence of authority we should be disposed to hold that if the right is the creation of the Code of Civil Procedure the remedy ought also to be limited to the remedy provided by the Code It is obviously most inconvenient after the sale had taken place that the auction purchaser should be entitled to come in and allege that the sale was bad on the ground of a defect in the debtor s title It may well have been that the money realized by the sale of the property has been distributed amongst a number of creditors On the other hand, if the auction purchaser s right is confined to the remedy provided by the Code under ordinary circumstances his application to set aside the sale would be made within one month and before the distribution of the money realized by the sale We find it however impossible to distinguish the present case from the case of *Munna Singh* v *Gajadhar Singh*(2) The learned Additional District Judge refers to the case of *Sidheswari Prasad Narain Singh* v *Goshain Mayanand* (3) The head note of this case is somewhat misleading That case like the present, was a suit to recover back purchase money on the ground of defect in the judgement-debtor s title The court no doubt considered what was the origin of the plaintiff's right to get back his purchase money and the court expressed its opinion that such rights as he had were the creation of the Code of Civil Procedure but it did not and could not as a Bench overrule the Full Bench decision above referred to We as a Bench feel ourselves bound by the decision of the Full Bench ruling in the case of *Munna Singh* v *Gajadhar Singh*(2) Before deciding whether we will refer the case to a larger Bench or finally decide the appeal, we think it desirable to refer an issue as to the interest of the judgement debtor at the time of the sale We accordingly refer the following issue — Had the judgement-debtor any saleable interest in the property at the date of the sale? In deciding this issue the court will not necessarily be bound to hold merely on proof of the sale deeds that the judgement-debtor had no saleable interest because if it should appear that the judgement

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(1) L. R., 5 I. A 126   (2) (1883) I L. R., 5 All., 577

(3) (1913) 11 A L J., 606, see also I L. R., 35 All., 419

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debtor was in possession or had acquired a title in any other way, he would in our opinion have a "saleable interest" and the sale could not be set aside. The parties may adduce any further evidence relevant to this issue. The case will be put up on return of the finding and the usual ten days will be allowed for filing objections.

Issue remitted.

FULL BENCH

1914
June 2.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

KANHAIYA LAL AND OTHERS (DEFENDANTS) v. TIRBENI SAHAI AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), sections 96 and 97—Partition—Appeal—Passing of final decree no bar to the hearing of an appeal against the preliminary decree.

When an appeal has once been filed and is pending against the preliminary decree in a suit for partition the passing of a final decree does not render the appeal nugatory. The final decree depends upon the preliminary decree and if, as the result of an appeal the latter is set aside the former must fall with it.

Kunya Mal v. Bishambhar Nath (1) overruled. *Khirodamoyi Dasi v. Adhar Chandra Ghose* (2) dissented from. *Muhammad Akhtar Husain Khan v. Tasadduq Husain* (3) and *Lakshmi v. Maru Devi* (4) followed. *Abdul Jalil v. Amar Chand Paul* (5) referred to.

THE facts of the case are, briefly, as follows:—

On the 26th of April, 1912, the court made a preliminary decree in a suit for partition. An appeal was filed but the lower court, on the 28th of June, 1912, during the pendency of the appeal, passed a final decree on the lines of the preliminary decree. No appeal was filed against the final decree. When the appeal came on for hearing a preliminary objection was raised to the effect that no appeal having been filed against the final decree the appeal could not be maintained. The lower appellate court allowed the objection and dismissed the appeal. The defendants appealed to the High Court.

* Second Appeal No. 465 of 1913 from a decree of E. O. Allen, District Judge of Mainpuri, dated the 18th of April, 1913, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 26th of April, 1912.

(1) (1910) I. L. R., 32 All., 225. (3) (1912) I. L. R., 34 All., 493.
(2) (1912) 16 C. L. J., 321. (4) (1911) I. L. R., 37 Mad., 29.
(5) (1913) 18 C. L. J., 293.

Munshi *Gulzari Lal* for the appellants submitted that the point for decision in the case was whether or not in a partition suit where both preliminary and final decrees had been passed an appeal from a preliminary decree filed before the passing of the final decree could be proceeded with without the final decree having been appealed against The Code of Civil Procedure laid down a complete scheme for preliminary decrees and provided for appeals against such decrees The word decree as defined in section 2 clause 2 of the Code of Civil Procedure included the preliminary as well as the final decree and applied to suits for partition partnership accounts foreclosure and sale, etc Order XX rules 15, 16 and 18 dealt with the preparation of preliminary decrees in partnership and partition suits Section 96 of the Code of Civil Procedure allowed appeals from every decree passed by an original court and section 97 precluded appeals from final decrees where no appeal had been preferred from preliminary decrees The preliminary decree was the basis of the final decree and should be considered as independent of the final decree Section 97 made it imperative to appeal from the preliminary decree The decision of a case on remand was no bar to the hearing of an appeal against the order of remand itself, *Uman Kunwari* v *Jarbandhan* (1) was in point and the analogy applied to appeals from preliminary decrees in partition

The Hon ble Munshi *Gokul Prasad* for the respondents submitted that, whether the preliminary decree in a partition suit was affirmed or set aside the final decree would remain binding unless that itself was set aside in appeal It did not necessarily follow that by the preliminary decree being set aside the final decree would also fall The jurisdiction of the court to pass a final decree was not determined by the passing of the preliminary decree *The jurisdiction of the court to proceed with a case on* remand ceased to exist as soon as the remand order was set aside and the analogy of the remand case therefore did not hold good Preliminary decree in a partition suit only defined certain rights of the parties and suggested the lines on which the partition was to proceed The jurisdiction of the court did not cease to exist after the passing of the preliminary decree The passing of a

(1) (1908) I L. R., 30 All 479

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preliminary decree did not give jurisdiction to pass a final decree The jurisdiction pre existed The final decree did not rest on the preliminary decree, *Khirodamoyi Dasi* v *Adhar Chandra Ghose* (1) and *Kuriya Mal* v *Bishambhar Das* (2) It was not contended that no appeal lay from a preliminary decree but that the appeal from that decree could not be heard unless the final decree also had been appealed against, *Sheonath* v *Ramnath* (3) and *Mackenzie* v *Narsingh Sahay* (4) If the final decree gave to the parties greater or smaller shares than that given by the preliminary decree at the worst the former would only be an incorrect decree and could be appealed against Even where the preliminary decree failed in appeal the final decree remained outstanding An appeal from final decree was necessary *Narain Das* v *Balgobind* (5) and *Baikuntha Nath Dey* v *Nawab Salimulla Bahadur* (6) *Abdul Jalil* v *Amar Chand Paul* (7), *Muhammad Akhtar Husain Khan* v *Tasadduq Husain* (8) and (*contra*) *Lakshmi* v *Maru Devi* (9) were also referred to

Munshi *Gulzari Lal* was not heard in reply

RICHARDS C J —This appeal arises out of a suit for partition On the 26th of April 1912 the court of first instance made a preliminary decree for partition On the 12th of June 1912 the defendants filed an appeal On the 28th of June the first court notwithstanding that an appeal against the preliminary decree was pending made a final decree on the lines of its preliminary decree On the 18th of April, 1913, the appeal against the preliminary decree came on for hearing Objection was taken that the appellant, not having appealed against the final decree of the 28th of June 1912, could not maintain his appeal against the preliminary decree The court allowed this objection and dismissed the appeal The defendants have now come to this Court in second appeal The question which we have to decide is whether or not the fact that the defendants did not appeal against the final decree precludes the Court from hearing the appeal against the preliminary decree Section 2 clause (2) of the Code of Civil Procedure

(1) (1912) 16 C L J, 371

(2) (1910) I. L R, 32 All, 225

(3) (1865) 10 Moo I. A, 413

(4) (1900) I L. R., 36 Calc 762

(5) (1911) I. L R 33 All., 528

(6) (1907) 12 C W N., 590

(7) (1913) 18 C. L. J., 223

(8) (1912) I. L. R 34 All., 493

(9) (1911) I L. R., 37 Mad., 29

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defines a decree as including a preliminary decree Section 96 gives a general right of appeal against decrees Section 97 is as follows — Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree" This last provision is not contained in the Code of 1882 I may point out that in a suit like the present more often than not the appellant against a preliminary decree would be unable to put forward any objection against the final decree in the event of his appeal against the preliminary decree being disallowed In all probability if the preliminary decree was sustained the final decree would follow in its line and could not be challenged In all such cases the only object of appeal against the final decree would be to keep the appeal against the preliminary decree alive I have already given my reasons for holding that the mere fact that there is no appeal against the final decree is no reason for not hearing the appeal against the preliminary decree on its merits in the case of *Muhammad Akhtar Husain Khan* v *Tasadduq Husain* (1) No doubt a contrary view was taken in the case of *Kuriya Mal* v *Bishambhar Das* (2) The learned Chief Justice at page 227 says — 'It seems to us that a serious anomaly would be created by the modification of the preliminary decree of the 25th of June, 1908, while the final decree of the 30th of June 1908 remained in force and had not been appealed against"

It seems to me that these remarks proceeded upon the erroneous assumption that the final decree remained in force after the preliminary decree upon which it was based had been set aside In my opinion in a suit for partition when the preliminary decree is set aside on appeal the final decree which is based upon it falls to the ground If I am right in this, there is no foundation for the supposed anomaly which the learned Chief Justice apprehended It has been held by the Calcutta High Court that the final decree continued after the preliminary decree had been set aside, but all these decisions proceeded on the basis that a party could challenge the correctness of the preliminary decree on an appeal from the

(1) (1912) I L. R 34 All. 493. (2) (1910) I L. R., 32 All 225

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final decree The provisions of the Code to which I have referred above now set this matter absolutely at rest. A party to a suit for partition who has not appealed against the preliminary decree can no longer challenge the correctness of that decree by an appeal against the final decree In the case of *Khirodamoyi Dasi* v *Adhar Chandra Ghose* (1) a bench of the Calcutta High Court decided that notwithstanding the provisions of section 97 of the Code of Civil Procedure, the final decree still stands The learned Judges after quoting the section, say —' The section does not, however, relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree, nor does it provide, how, if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it." With great respect to the learned Judges I think they overlooked that the whole foundation of the rulings in Calcutta was based upon the opinion of that court that a party could challenge the correctmess of the preliminary decree upon an appeal against the final decree The provisions of the Code which they themselves quote show that this can be no longer done In the course of the arguments the case of *Lakshmi* v *Maru Devi* (2) has been cited The learned Judges in that case took the same view which I take in the present case I would allow the appeal

TUDBALL J —I fully agree with what the learned Chief Justice has said Where the second decree depends for its validity upon the first, when the latter is set aside on appeal the former must go with it Even the Calcutta High Court has resiled somewhat from the position which it took up formerly In *Abdul Jalil* v *Amar Chand Paul* (3) a bench of that Court consisting of the learned Chief Justice and Sir ASUTOSH MOOKERJEE held that "when a preliminary decree for partition has been set aside on appeal, and pending appeal from the preliminary decree a final decree was passed, no effect remained in the final decree" With that view I fully agree. I would, therefore, allow the appeal

CHAMIER, J —I agree The Code gives a right of appeal against

(1) (1912) 18 C L J, 321 (2) (1911) I L R. 37 Mad., 2?.
(3) (1913) 18 C L J., 223.

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a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree It seems to me that we are not at liberty to read into the Code any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of an appeal against the preliminary decree I would allow the appeal

BY THE COURT —We allow the appeal set aside the decree of the court below and remand the case to that court with directions to re admit the appeal under its original number in file and proceed to determine it according to law Costs here and heretofore will be costs in the cause

Appeal decreed and cause remanded

APPELLATE CIVIL

Before Justice Sir Pramada Charan Banerji and Mr Justice Chamier

1914 *June 3*

CHUNNI BIBI (DEFENDANT) v BASANTI BIBI AND ANOTHER (PLAINTIFFS) *

Act No I of 1872 (Indian Evidence Act) section 92 proviso (1)——Evidence——Consideration—Admissibility of evidence to prove that the true consideration is other than that which appears from the deed embodying the transaction

If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass the case falls within the first proviso to section 92 of the Indian Evidence Act 1872 and the other party is at liberty to prove what the real consideration was Evidence can be given to prove the real nature of the transaction.

Hanif un-nissa v *Faiz un-nissa* (1) followed. *Jumna Doss* v *Srinath Roy* (2) *Shah Mukhun Lall* v *Baboo Sree Kishen Sing* (3) *Lala Himmat Sahai Singh* v *Llewhellen* (4) *Hukumchand* v *Hiralal* (5) *Indarjit* v *Lal Chand* (6) *Kailash Chandra Neogi* v *Harish Chandra Biswas* (7) *Nathu Khan* v *Sewak Koer* (8) *Muhammad Yusuf* v *Muhammad Musa* (9) and *Adityam Iyer* v *Ramakrishna Aiyar* (10) referred to

THE facts of this case were as follows —

* First Appeal No 298 of 1913 from a decree of B J Dalal District Judge of Benares dated the 23rd of June 1913

(1) (1911) I. L. R., 33 All. 340
(2) (1880) I L. R 17 Calc 176 (note)
(3) (1868) 12 Moo I A 157
(4) (1885) I. L. R. 11 Calc. 486
(5) (18[illegible]6) I L. R, 3 Bom., 159
(6) (1895) I L. R 18 All., 168.
(7) (1900) 5 C W N., 1[illegible]3
(8) (1911) 1[illegible] C. W N 408.
(9) Weekly Notes 1907 p. 181.
(10) (1913) 25 M L J 602.

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The plaintiffs respondents sold certain property to the defendant appellant The consideration for the sale was stated in the sale deed to be Rs 40,000 The deed contained a recital that the executants had received the whole of this consideration At the time of the registration of the deed Rs 2,400 were paid to the plaintiffs in cash and the balance Rs 37,600 was acknowledged to have been already received by them They executed a receipt for Rs 37 600 in favour of the defendant appellant In 1912 the plaintiffs brought a suit on the allegations that they had been induced by the vendee's agents to acknowledge receipt of the whole of the consideration and to execute the receipt for Rs 37 600, although that sum had not been paid to them, that the agents had represented that the said sum should be left with themselves in order to pay off certain creditors of the plaintiffs and promised that any balance left over after payment to the creditors would be paid to the plaintiffs, that they had paid Rs 11,726 to one creditor, and had also spent Rs 1,000 in connection with the execution of the sale-deed in suit, but had not paid the balance, Rs 24,874, either to any creditor or to the plaintiffs Thus according to the plaintiffs, out of the consideration of Rs 40,000, only Rs 15,126 had actually been paid, and they sued to recover the balance, Rs 24,874, with interest thereon The defence to the suit was that the real price agreed upon for the sale was only Rs 15,126 and had been fully paid as set forth above, that the remainder of the consideration stated in the deed was merely fictitious, that at the time of the sale the plaintiffs had said that certain relatives of theirs were keen to purchase the property, but they did not like to sell to them, and that as the plaintiffs wanted to avoid giving open offence to those relatives they persuaded the defendant vendee to agree to the entry in the sale-deed of the fictitious price of Rs 40,000, so that the relatives might believe that the property was sold for a price which they would not like to pay for it

The court trying the suit held that the defendant was debarred by section 92 of the Evidence Act from giving any oral evidence in support of her allegation that the consideration was other than Rs 40,000 and decreed the plaintiffs' claim The defendant vendee appealed to the High Court

The Hon'ble Dr *Sundar Lal*, (with him Babu *Harendra Krishna Mukerji*) for the appellant —

The defendant's case is that the real agreement between the parties was that the property was to be ostensibly sold for Rs 40 000 but the real consideration was to be only Rs 15 126 The sale deed which states that the sale took place for Rs 40 000 does not contain the whole of the agreement between the parties Where the parties did not intend to reduce all the terms of the contract into writing and the writing therefore does not constitute the whole of the contract parol evidence is admissible to prove the terms which were not intended to be included in the writing, *Jumna Doss* v *Srinath Roy* (1) Where a portion of the contract is not embodied in the deed the defendant is entitled to prove the real transaction by oral evidence, *Nathu Khan* v *Sewak Koeri* (2)

Sections 91 and 92 of the Evidence Act do not apply to such a case Even supposing that these sections apply the case falls within proviso (1) of section 92, for the allegation of the defendant is such that if proved it would entitle her to a decree for rectification or rescission of the sale deed Further, the case may be regarded as one of mistake of both parties Besides this the case comes within the principle of law that where one party to a written contract is allowed to go behind his own recital stating that he has received the consideration entered therein the other party is entitled to give parol evidence that the real and true consideration was something other than what is recited in the deed For a party cannot both affirm and disaffirm the same transaction, he cannot show its true nature for his own relief and at the same time insist on its apparent character to prejudice his adversary, *Shah Mukhun Lall* v *Baboo Sree Kishen Sing* (3), *Lala Himmat Sahai* v *Llewhellen* (4) Therefore if the plaintiffs want to show that the recital as to their having received the whole of Rs 40 000 is not correct and they have received some other amount the defendant is also entitled to show that the recital of Rs. 40 000 being the consideration is not correct and that the true consideration was a different amount So, too, in the following cases it was held that it was open to a

(1) (1886) I L R 17 C lc 176 (note) (3) (1833) 12 Moo I. A., 157
(2) (1911) 15 C W N 403 (4) (1833) I L. R., 11 Cal., 486

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party to show notwithstanding the recitals in the deed that the actual consideration was different from that stated in the deed, *Indarjit* v *Lal Chand* (1), *Hukumchand* v *Hiralal* (2) and *Kailash Chandra Neogi* v *Harish Chandra Biswas* (3) Evidence is always admissible to show what the real transaction or agreement between the parties was For example it has been held that it was open to a party to show that an ostensible sale for a stated price was in reality a free gift, or that two sales for stated prices were in reality a mutual exchange of properties and that no payment in cash was contemplated, or that a professed sale for a stated price was really a conveyance in consideration of certain services rendered, *Hanif un nissa* v *Faiz un nissa* (4), *Muhammad Yusuf* v *Muhammad Musa* (5), *Krishna Bai* v *Rama Bala* (6) and *Ansa Tuka* v *Kenchappa Satappa* (7)

The present case comes within the principle of the rulings in the above cases

Dr *Satish Chandra Banerji* (with him Babu *Sarat Chandra Chaudhri*) for the respondents —

The first contention of the appellant is that the whole of the contract has not been embodied in the sale-deed The terms of the sale have been reduced to writing The consideration or price is a term and an essential term of the contract of sale Whatever other term of the contract may have been left out of the deed the term relating to the amount of the consideration was clearly and expressly entered and section 92 of the Evidence Act bars any oral evidence for the purpose of varying or contradicting it The distinction between a recital of a term of the contract for example the price and a recital of certain other facts for example, the mode of payment was pointed out in the case of *Indarjit* v *Lal Chand* (1) Then it cannot be said that any of the parties was under a mistake Both parties understood exactly what they were doing There exists no ground which can bring the case within proviso (1) of section 92 The want or failure of consideration' mentioned in that proviso must be one which would invalidate the document and not a mere non payment of a part of it The

(1) (1895) I L. R., 18 All., 168
(2) (1876) I. L. R., 3 Bom. 159
(3) (1900) 5 C W N 158.
(4) (1911) I L R 33 All. 340.
(5) Weekly Notes 1907, p 181
(6) (1906) 8 Bom L. R. 764
(7) (1905) 8 Bom L. R., 660

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defendant alleges that the real agreement was that Rs 15 126 was to be the actual consideration but that Rs 40,000 was to be the stated price in the deed An allegation of an exactly similar nature was made in the case of *Adityam Iyer* v *Rama krishna Aiyar* (1) There it was sought to be proved that the agreement was that Rs 36 000 was to be the true consideration although Rs 35 000 was to be shown in the deed It was held that the price was a material term of the deed, and that the allegation made did not bring the case within any of the provisoes of section 92, so that oral evidence was not admissible to prove the alleged fact and thereby vary or contradict the term relating to the amount of the consideration Of the cases cited by the appellant the one reported in 12 M I A 157, was decided prior to the enactment of the Evidence Act of 1872 Now the law is laid down by section 92 of that Act, and the defendant has to bring his case within one or other of the provisoes Besides, the amount of the consideration was not in question in that case In fact none of the cases relied on by the appellant furnishes an authority applicable to the facts of this case The question in this case is whether a party to a sale deed which states the consideration to be a particular sum of money can give oral evidence to show that the real consideration was a different sum of money This question did not arise in any of those cases In the case in I L R, 3 Bom. 159 the amount of the consideration, Rs 100, was not questioned The only question was whether a part of the Rs 100 was paid in cash as stated or was given credit for on account of another bond In the case in 18 All, 168, the question was whether a part of the consideration was paid in cash or was held over to meet the expenses of certain litigations There was no dispute as to the amount of the consideration The passage at page 171 of the report which is relied on by the appellant is merely *obiter dictum* if it is construed to lay down that a party to a deed can prove that the real consideration differed from the stated consideration in any way other than the mode of payment thereof The case in I L R, 11 Calc., 486, was also one of the mode of payment of a portion of the consideration money The case in 27 A. W. N, 181, is another instance of the consideration

(1) (1913) 25 M. L. J., 602

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having passed in a different form from that stated in the deed, the amount was not in question The case in 5 C W N 158 was that of an illegal sale not genuine, it clearly came within the proviso s In 15 C W N, 408 the point was raised by a person who was not a party to the sale deed, moreover, no reasons are given in the judgement in that case In the case in I L R 33 All, 340 the ostensible sale deed for Rs 60 000 was really a deed of pure gift There was an entire want of consideration and the document *qua* sale deed would be invalidated Proviso (1) of section 92 would cover that case and perhaps also proviso (6) In the present case it is not denied that the document is really a sale deed The other cases cited by the appellant have no application The only case exactly in point is that in 25 M L J 602 cited above

The Hon ble Dr *Sundar Lal* in reply —

The case in 25 M L J, 602 was not a suit for recovery of balance of consideration The real point in that case was that the true consideration of the two sale deeds was the discharge of the three previous bonds, whatever the aggregate amount of those may have been

CHAMIER J —This appeal arises in a suit brought by the respondents for an alleged balance of purchase money and interest thereon

On the 21st of July 1909 the respondents sold some zamindari property to the appellant for Rs 15 000 Part of the property had been sold in execution of a decree and it was intended that the appellant should get the execution sale set aside But it was discovered that according to order XXI rule 89 as then interpreted neither the vendors nor the purchasers could get the sale set aside Accordingly the appellant relinquished her interest in the property by a registered deed The respondents then raised on a mortgage of the property in favour of one Parsotam Das a sum sufficient to pay off the decree holder and in due course the sale was set aside On the 28th of October 1909 the respondents executed in favour of the appellant a deed whereby they sold to her the property which had been the subject of the earlier sale together with some other property for the stated sum of Rs 40,000 The deed contains a recital that the respondents have received

the whole of this sum and have out of it paid off Parsotam Das and discharged other debts. Before the Sub-Registrar they received a sum of Rs. 2,400 and acknowledged the receipt of Rs. 37,600. On the same day they gave the appellant a receipt for Rs. 37,600.

The present suit was instituted on the 3rd of November, 1912, the last day of limitation. The respondents allege that they were obliged to sell the property in order to raise some cash and pay off some creditors, that certain persons acting on behalf of the appellant induced them to acknowledge the receipt of the consideration in full and to sign the receipt for Rs. 37,600 by representing that they would after the registration of the deed pay off certain creditors of the respondents and make over to them proof of the payment and account for the balance, but they had paid only Rs. 11,726 to Parsotam Das. Giving the appellant credit for that amount, for Rs. 1,000 spent in connection with the execution of the deed and for Rs. 2,400 paid at registration, the respondents claimed a decree for the balance, Rs. 24,874, and interest thereon. The appellant's defence was that the real consideration for the sale was Rs. 15,126, made up of the three sums of Rs. 11,726, Rs. 1,000 and Rs. 2,400 mentioned above and that the property was not worth more. She said that Parsotam Das wished to buy the property, but for reasons of their own the respondents did not wish to sell to him, therefore they gave out that they were selling the property for Rs. 40,000, a sum which Parsotam Das was not prepared to pay, and they induced the appellant to agree to this sum being entered in the sale-deed in order that Parsotam Das might have no cause for complaint.

The question for decision is whether the appellant is entitled to produce oral evidence in proof of her allegations. The court below has held that she is not.

On behalf of the appellant it was contended that her allegations if proved would entitle her to have the sale deed rectified or rescinded, also that it was a case of mistake, therefore the case fell within the first proviso to section 92 of the Evidence Act. It was also urged that all the terms of the contract had not been embodied in the deed, therefore section 91 of the Act and consequently section 92 also did not apply, and we were referred to the case

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of *Jumna Doss* v *Srinath Roy* (1) But none of these arguments was seriously pressed and it seems unnecessary to consider them

The main contention of the learned advocate for the appellant was that if the respondents are entitled as they undoubtedly are to go behind the recital and admission in the deed and prove that the entire consideration has not been paid it is open to the appellant to produce oral evidence as to the true nature and extent of the consideration Among the cases relied upon were those of *Shah Mukhun Lal* v *Baboo Sri Kishen Sing* (2) *Lala Himmat Sahai Singh* v *Llewhellen* (3) *Hukumchand* v *Hiralal* (4) *Indarjit* v *Lal Chand* (5) affirmed on appeal in I L R 22 All 370 *Kailash Chandra Neogi* v *Harish Chandra Biswas* (6) *Nathu Khan* v *Sewak Koeri* (7) *Muhammad Yusuf* v *Muhammad Musa* (8) and *Hanif un-nissa* v *Faiz un nissa* (9).

The first of these cases was a suit for redemption of a mortgage purporting to make interest payable at the rate of 9 per cent The plaintiff put forward other documents executed at about the same time and proved that they evidenced a single transaction and were a contrivance to evade the usury laws He thus put himself in a position to redeem the mortgage before the date fixed by one of the documents He wished, however, to have the interest calculated at 9 per cent. The defendants pleaded that the rate agreed upon was 12 per cent. Their Lordships of Privy Council dealing with this matter said, — The rules of evidence and the law of estoppel forbid any addition to or variation from deeds or written contracts The law however furnishes exceptions to its own salutary protection one of which is when one party for the advancement of justice is permitted to remove the blind which hides the real transaction as for instance in cases of fraud illegality and redemption in such cases the maxim applies that a man cannot affirm and disaffirm the same transaction show its true nature for his own relief and insist upon its apparent character to prejudice his adversary'

(1) (1886) I L. R., 17 Calc 176 (note)
(2) (1868) 12 Moo. I.A., 157 (185)
(3) (1885) I L. R. 11 Calc 486
(4) (1876) I L. R., 3 Bom. 159
(5) (1895) I L. R., 18 All., 168
(6) (1900) 5 C W N 158.
(7) (1911) 15 C W N 408
(8) Weekly Notes 1907 p 181
(9) (1911) I. L. R. 33 All., 340

In the second case a deed recited payment of Rs 2 000 in a lump sum to the executant who however, sued for recovery of Rs 1 850 alleging that only Rs 150 had been paid The defendant admitted that no more than Rs 150 had been paid and that Rs 850 were still due As regards the remaining sum of Rs 1000 he was allowed to prove by oral evidence an agreement to the effect that it was to be retained by him on account of a debt due to him by a relative of the plaintiff The court held that it was under the first proviso to section 92 of the Evidence Act that the plaintiff was entitled to go behind the recital and prove that only Rs 150 had been paid and on the strength of the passage cited above from the judgement of their Lordships of the Privy Council they went on to hold that the defendant was entitled to prove that the consideration was different from that stated in the deed

In the third case the defendant challenged the title of the plaintiff who relied upon a sale deed purporting to transfer the property to him in consideration of Rs 100 already received in cash. The plaintiff was allowed to meet the defendant's case by proving that the consideration consisted of Rs 63 12 0 due on a bond and Rs 36-4 0 paid in cash The court was of opinion that there was no real variance between the statement in the deed and the statements of the plaintiff's witnesses but in the course of their judgement they observed that section 92 of the Evidence Act does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that described in the contract.

In the fourth case there was a recital in the sale deed that the whole of the consideration money had been received, but their Lordships of the Privy Council ruled that in such a case it was open to the vendor to prove that no consideration had passed and they held that evidence was admissible to prove an agreement that the consideration money should remain in the hands of the purchaser for certain purposes and to be accounted for later In the judgement of the High Court in a passage which perhaps went further than was necessary it was said — If it is open to a party as is undoubtedly the case to show notwithstanding a recital in the deed that no consideration passed or that the actual considera ion

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was different from that stated in the deed it is in our opinion open to a party to prove under what circumstances the payment of consideration was postponed and what was the mode agreed upon as to the payment of it." The second and third cases above mentioned were referred to in this connection.

The fifth case was a suit to set aside a sale deed on the ground that there had been no consideration for it and that it had been obtained by unfair means. The deed recited that Rs. 500 had been received in cash. The plaintiff gave evidence that nothing had been paid and the defendant was permitted to adduce evidence that there was some, and that ample, consideration for the transaction though not the amount stated in the deed. The court seems to have been of opinion that it was under the first proviso to section 92 of the Evidence Act that the plaintiff was entitled to go behind the recital, and it was laid down by both the learned Judges that in such a case the other party was entitled to prove that there was some consideration for the deed. The Chief Justice relied upon the second and third cases mentioned above and BANERJI J. referred to one of them with approval.

In the sixth case the plaintiff sued for Rs. 800 the consideration stated in a *kabala* and therein acknowledged to have been received. The plaintiff proved that it had not been paid and the defendant was allowed to prove that the stated consideration was fictitious and that the real consideration was services rendered by the defendant.

In the seventh case two sisters had agreed to exchange properties. Each executed in favour of the other a sale deed in which the consideration was stated to be Rs. 1,000 and payment in full was acknowledged. In a suit by one of the sisters for the amount of the consideration the defendant was allowed to prove that the real consideration was the property given in exchange.

In the eighth case the plaintiff had executed in favour of the defendant what purported to be a sale deed of property for Rs. 60,000 the receipt of which was acknowledged in the deed. The plaintiff on certain grounds asked that the deed should be set aside and in the alternative claimed a decree for the sum of Rs. 60,000. She proved that the money had not been paid and the defendant was allowed to prove that the executant had intended

to make a gift of the property and had never intended to take any part of the alleged consideration

The respondents rely upon the decision of the Madras High Court in *Adityam Iyer* v *Ramakrishna Aiyar* (1) which will be referred to later As regards the cases relied upon by the appellant they urge that the first of them merely lays down one of the rules subsequently embodied in section 92 of the Evidence Act and that the passage quoted has no application to the facts of this case inasmuch as the respondents are not seeking to *remove the blind* which hides the real transaction, but wish merely to contradict a statement of fact contained in the deed, that the 2nd 3rd 4th 6th and 7th cases are not authorities for the proposition that a party may prove by oral evidence that the consideration for a sale is less than or different from that stated in the deed but are only instances of parties to deeds being allowed to show that the consideration passed in a form other than that stated in the deed, and that if the fifth case goes further than that it was wrongly decided As regards the eighth case, the respondents contend that it was a case of facts being proved which would invalidate a document within the meaning of the first proviso to section 92 of the Evidence Act

It is true no doubt that several of the cases relied upon by the appellant were cases in which a party to a deed sought to prove that the consideration passed in a form different from that stated in the deed not to prove that the amount of the consideration was different in amount from that stated in the deed. But in the fifth case the defendant seems to have been allowed to prove that the amount of the consideration was different from that stated in the deed and in the eighth case the defendant was permitted to prove that the consideration did not pass at all and was never intended to pass In some of the cases the decision rests upon a ground which applies as much to one kind of case as to the other, namely, that if one party to a deed alleges and proves that the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to section 92 of the Evidence Act and the other party is at liberty to prove what the real consideration was It appears to me that

(1) (1913) 25 M. L. J., 602.

it must have been upon this ground that their Lordships of the Privy Council admitted the evidence tendered by the defendant in the eighth case

The Madras case relied upon by the respondents is distinguishable It was a suit upon a mortgage The defence set up was discharge it being contended that the discharge of the mortgage was part consideration for the sale of certain properties to the mortgagor some years after the mortgage The discharge of the mortgage was not mentioned in the deed of sale but the defendant sought to prove the arrangement by oral evidence The court held that such evidence was not admissible It was not a case in which one party denied receipt of consideration acknowledged by him in a deed and the other party sought to prove that the true consideration was other than that stated in the deed

On the authorities I would hold that as the respondents have alleged and proved that the whole of the consideration, receipt of which is acknowledged in the deed, did not pass, the appellant is entitled to produce oral evidence in support of her allegations, and as the court below did not allow her to produce such evidence I would remand the case for a fresh trial

BANERJI J—This was a suit to recover unpaid purchase money The plaintiffs executed a sale deed in favour of the defendant appellant on the 28th of October, 1909 The amount of consideration for the sale is stated in the sale deed to be Rs 40 000 The plaintiffs state that they have received out of this sum Rs 21,726 and that the balance is due The defendant contended that the amount of consideration specified in the sale-deed was fictitious and that the real amount agreed to be paid was that which the plaintiffs admitted to have received. The question to be determined is whether, in view of the provisions of section 92 of the Evidence Act, the defendant appellant is entitled to produce oral evidence in support of her allegation

A large number of rulings have been cited by the respective parties but I deem it unnecessary to consider and discuss them, as I am of opinion that the matter is concluded by the recent decision of their Lordships of the Privy Council in *Hanif-un-nissa v Faiz-un-nissa* (1) In that case the plaintiff, who had executed

(1) (1911) I L. R., 33 All., 340

a document which on the face of it was a sale-deed for Rs 60,000, sought to have it cancelled on various grounds and in the alternative claimed the Rs 60,000 The defendants alleged that the transaction was in fact a gift and not a sale as it purported to be This Court held that the defendants were precluded by the provisions of section 92 of the Evidence Act from proving that the transaction was different from that which it purported to be and that it was in reality a gift Their Lordships of the Privy *Council reversed this decision and held that oral evidence could* be given by the defendants to prove the real nature of the transaction Apparently their Lordships were of opinion that the case would come within the first proviso to section 92 I am unable to distinguish the present case from the principle of the ruling above mentioned In view of that ruling I must hold that the appellant is entitled to produce oral evidence to prove her allegations As the court below did not permit her to produce such evidence the case must be remanded to that court

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CHUNNI BIBI v BASANTI BIBI

BY THE COURT —The order of the Court is that the appeal be allowed, the decree of the court below be set aside and the case be remanded to the court below with directions to re-admit it under its original number in the register and dispose of it according to law, after allowing the parties to adduce such evidence as they may bring forward The costs hitherto incurred will be costs in the cause

Appeal decreed and cause remanded

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

1914 *June, 5*

JAGANNATH AND OTHERS (APPLICANTS) v LACHMAN DAS AND ANOTHER (OPPOSITE PARTIES)*

Act No III of 1907 (Provincial Insolvency Act) section 36—Insolvent—Question of bonâ fides *of transfer by insolvent—District Judge not competent to refer to subordinate court.*

Held that a court exercising insolvency jurisdiction under Act No. III of 1907 has no power to refer for inquiry to a subordinate court a question arising under section 36 of the Act as to whether a mortgage executed by an insolvent was *bonâ fide* or not

IN this case one Lachman Das was adjudicated an insolvent on the 6th of December, 1912 He had made a mortgage of his

*First Appeal No 31 of 1914 from an order of H Nelson Wright, District Judge of Bareilly dated the 20th of June, 1913

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JAGANNATH v. LACHMAN DAS

property on the 11th of April, 1912, and the receiver appointed in the insolvency proceedings made a report to the District Judge suggesting that this mortgage should be annulled under section 36 of the Provincial Insolvency Act, 1907. On the 23rd of January, 1913, the District Judge asked a Munsif to hold an inquiry and report if the mortgage was made *bonâ fide* or not. The Munsif after taking evidence reported that the mortgage had been made *bonâ fide*. The District Judge accepted the Munsif's finding and directed that the mortgage must stand. Against the Judge's order some of the creditors appealed to the High Court.

Babu *Purushottam Das Tandan*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondents.

CHAMIER and MUHAMMAD RAFIQ, JJ.—Lachman Das was adjudicated insolvent on the 6th of December, 1912. He appears to have made a mortgage of his property on the 11th of April, 1912. The receiver appointed in the insolvency proceedings made a report to the District Judge suggesting that this mortgage should be annulled under section 36 of the Act. On the 23rd of January, 1913, the District Judge asked the Munsif of Pilibhit to hold an inquiry and report whether the mortgage was made *bonâ fide* or not. The Munsif after taking evidence reported that the mortgage had been made *bonâ fide*. The District Judge accepted his finding and held that the mortgage must stand. The Act makes no provision for the reference of such a matter to a subordinate court. The District Judge alone had jurisdiction in the matter and should himself decide upon such evidence as may be available whether or not action should be taken to have the mortgage set aside. The District Judge should give the receiver and the creditors an opportunity of being heard in the matter before he arrives at a decision. We set aside the present order that the mortgage is to stand. No order as to costs.

Appeal allowed.

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

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June, 5

SARBDAWAN SINGH AND OTHERS (DEFENDANTS) *v* BIJAI SINGH AND ANOTHER (PLAINTIFFS) AND BABUNANDAN AND OTHERS (DEFENDANTS) *

Mortgage—Redemption—Condition intended to defeat the right of redemption—Condition held to be unenforcible

A court of equity will not permit any device or contrivance designed or calculated to prevent or impede redemption, although it may be impossible to la down any general rule as to what should not be regarded as an improper restraint or fetter on the right of redemption

Where a mortgage was made for forty years and a provision was inserted in the deed fixing a particular day on which it was to be redeemed, failing which the mortgage was to be renewed for another term of forty years, and it was further provided that the mortgage should not be redeemed with borrowed money, it was *held* that these provisions were designed to make redemption very difficult if not impossible, and should not be enforced *Bansi* v *Girdhar Lal* (1) and *Ramtaran Singh* v. *Ramker Singh* (2) referred to

THE facts of this case were as follows :—

A usufructuary mortgage was made on the 4th of February, 1871, by the father of the respondent Bijai Singh in favour of Ram Din Singh, father of the four appellants. The mortgage was for a term of forty years and was to be redeemed on the day following the completion of that term, but, if the mortgagor failed to redeem on that day, the mortgage was to hold good for a second term of forty years It was also provided that the mortgagor should not be entitled to redeem the mortgage with borrowed money. The mortgage money was paid into court under section 83 of the Transfer of Property Act on the 10th of June, 1911, but the appellants refused to accept it. The present suit was filed on the 9th of September, 1911. The defence was that the representative of the mortgagor was not entitled to claim redemption of the mortgage except on the day following the expiry of the term of forty years The Subordinate Judge accepted this plea and dismissed the suit On appeal the District Judge held that the mortgage deed did not show with certainty the day on which redemption might be effected and that the provision that the mortgagee might retain possession for another forty years in case the mortgagor failed to redeem at the end of the first term was penal and should not be enforced. Accordingly he decreed the claim.

* First Appeal No 9 of 1914, from an order of B. J. Dalal District Judge of Benares, dated the 24th of September, 1913

(1) Weekly Notes, 1894, p 143 (2) (1910) 10 Indian Cases, 243

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SARDAWAN SINGH v. BIJAI SINGH

The defendants mortgagees appealed to the High Court

Dr *Surendro Nath Sen*, for the appellants

Dr *S L Sulaiman* for the respondents

CHAMIER and MUHAMMAD RAFIQ JJ —This is an appeal in a suit brought for redemption of a usufructuary mortgage made on the 4th of February 1871, by the father of the respondent Bijai Singh in favour of Ram Din Singh father of the four appellants The mortgage was for a term of forty years and was to be redeemed on the day following the completion of that term but if the mortgagor failed to redeem on that day the mortgage was to hold good for a second term of forty years It was also provided that the mortgagor should not be entitled to redeem the mortgage with borrowed money The mortgage money was paid into court under section 83 of the Transfer of Property Act, on the 10th of June, 1911, but the appellants refused to accept it The present suit was filed on 9th of the September, 1911 The defence was that the representative of the mortgagor was not entitled to claim redemption of the mortgage except on the day following the expiry of the term of forty years The Subordinate Judge accepted this plea and dismissed the suit On appeal the District Judge held that the mortgage deed did not show with certainty the day on which redemption might be effected and that the provision that the mortgagee might retain possession for another forty years in case the mortgagor failed to redeem at the end of the first term was penal and should not be enforced Accordingly he decreed the claim

In this appeal it is contended that the decision of the District Judge is erroneous

The date given at the foot of the mortgage is Magh Sudi 14 Sambat 1967, the Fasli year being stated to be 1278 The corresponding date according to the British calendar was the 4th of February 1871 but is not given in the deed According to the Fasli or Sambat year the term of forty years expired on the 13th of February 1911 and redemption should have been effected on the 14th of February According to the British calendar forty years expired on the 3rd of February and redemption should have been effected according to the deed on the 4th of February. The calendar now commonly employed in transactions of this kind is the British calendar, but it is not certain that two rustics, as the

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mortgagor and mortgagee in the present case were intended that the term of the mortgage should be calculated according to the British calendar The deed is written in the Nagri character and seems to have been the production of some village writer of documents We are unable to say that the deed indicates with certainty the date on which redemption might be effected But assuming that some date is definitely fixed by the deed for redemption we are of opinion that the provision in question was designed to prevent redemption or at all events to hamper the mortgagor in such a way as to make redemption almost impossible It is unnecessary to cite authority for the proposition that a Court of Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption The appellants rely upon cases in which it has been held that the postponement of the right to redeem till the end of a very long term of years in one case ninety years is not a ground for holding that the provision should not be enforced—*Muhomed Ibrahim* v *Muhomed Abiz Kroshi* (1) *Ram Prasad* v *Jagrup* (2) *Puran Singh* v *Kesar Singh* (3), upon a large class of cases of which that of *Bansi* v *Girdhar Lal* (4) is an example and upon the decision of GRIFFIN, J in *Rambaran Singh* v *Ramker Singh* (5) affirmed in L P A No 73 of 1911

The English Courts have shown a strong disinclination to uphold provisions restraining redemption for long periods and we doubt whether they would approve some of the Indian decisions on this question We doubt also the soundness of the reason that has been given for upholding such provisions in this country, namely that the Indian Limitation Act allows a very long period for suits for redemption But cases in which the parties have merely agreed to fix a very long term for a mortgage are not to be compared with a case in which a very long term has been fixed and a provision has been inserted in the deed which makes redemption very difficult if not impossible at the end of that term.

The present case is also clearly distinguishable from such cases as that of *Bansi* v *Girdhar Lal* (4) It is an old and, we

(1) (1910) 8 Ind an Cases 1068, (3) (1907) Punj Rec O J., No 89
(2) (1912) 10 A L J., 157 (4) Weekly Notes 1894, p. 143.
(5) (1910) 10 Indian Cases 243

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think, a reasonable practice to provide that redemption take place only in the *khali fasl*, in the month of Jeth, wh the crops are off the ground The mortgagor is allowed a in which to redeem the mortgage, and if he fails to redeem with the month he must wait till the following year We have seen mortgages in which it was provided that if the did not redeem during the *khali fasl* immediately following the expiry of the term fixed he should not be entitled to redeem till after the expiry of several more years, and such provisions have often been enforced But to give a man one day only in eight years on which he may redeem is to make difficulties for him far greater than are to be found in cases like *Bansi* v *Girdhar Lal* (1) or the other cases to which we have referred

There remains to be considered the case of *Rambaran Singh* v *Ramker Singh* (2) decided by this Court In that case the mortgage was made on the 3rd of June 1895, and provided that the mortgagor might redeem on Jeth Sudi Puranmashi 1315 Fasli i e a little over thirteen years after the date of the mortgage, and that if the mortgagor failed to redeem on that date, the mortgagee would be entitled to retain possession for another term of thirteen years This Court held that the provision should be enforced Section 83 of the Transfer of Property Act had been passed before that mortgage was made, a provision which has made the redemption of mortgages much easier than before, but there was no such provision in force when the mortgage now in suit was made. The consequences of failure to redeem that mortgage on the day fixed were much less serious than in the case before us and in that case the mortgagor was to have an unfettered right to redeem at the end of twenty-six years a period much shorter than the first term fixed by the mortgage now in suit On those grounds that case may, if necessary, be distinguished from the present one

But it is impossible to lay down a hard-and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the right of redemption The decision in each case must depend upon its own circumstances We are satisfied that the provision for redemption in the present instance

(1) Weekly Notes 1894 p 143. (2) (1910) 10 Indian Cases, 243

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was designed to make redemption very difficult, if not impossible The stipulation that the mortgage should not be redeemed with borrowed money, which is admittedly invalid, shows that the mortgagee intended to place every obstacle in the way of redemption

The provision that redemption may take place on one day only in the course of eighty years is most oppressive. Many circumstances might easily prevent redemption on that day, for example the illness of the mortgagor, the absence of the mortgagee, or the impossibility of discovering, on account of the recent death of either mortgagor or mortgagee, what persons were entitled to redeem or to receive the mortgage money The shorter the time during which the money is to be paid the more difficult does redemption become It was conceded in argument that a provision making redemption possible only during two or three hours on a particular day during a long term of years should not be enforced. In our opinion the lower appellate court was right in refusing to enforce the provision for redemption in this case We dismiss the appeal with costs

Appeal dismissed

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

THE MUNICIPAL BOARD OF GHAZIPUR (DEFENDANT) v DEOKINANDAN PRASAD (PLAINTIFF)*

1914 June, 8.

Act No IX of 1908 (Indian Limitation Act), schedule I, articles 2 62 and 120—Limitation—Suit for refund of octroi duty not alleged to have been in the first instance wrongfully exacted

The plaintiff sued a municipal board for a refund of octroi duty He did not allege that the duty had in the first instance been taken from him illegally, but that he had after payment thereof become entitled to a refund. *Held* that the suit was governed by article 120 and not by article 2 or article 62 of the Indian Limitation Act 1908. *Rajputana Malwa Railway Co-operative Stores* v *Ajmere Municipal Board* (1) *Guru Das* v *Ram Narain* (2) and *Hanuman* v *Hanuman* (3) referred to

IN this case the plaintiff came into court asking for a refund of octroi duty which he had paid to the Ghazipur municipality on certain logs His allegation was that when the duty was demanded he had represented to the Board that the logs were being

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* First Appeal No. 8 of 1914 from an order of Sri Lal, District Judge of Ghazipur dated the 26th of June, 1913

(1) (1910) I.L.R., 32 All., 491 (2) (1884) I.L.R., 10 Calc., 860.

(3) (1893) I.L.R., 19 Calc. 123.

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imported for the use of the Government at the opium godown, but they refused to accept the plea. A few days later he produced a certificate from the Public Works department that the logs had been used for Government and asked for a refund of the duty which he had paid, but the Board declined to refund. The court of first instance dismissed the suit as barred by limitation under article 62 of the first schedule to the Indian Limitation Act, 1908. On appeal by the plaintiff, however, the District Judge held that article 120 applied and remanded the case to the lower court for disposal on the merits. Against this order of remand the Board appealed to the High Court.

Mr. *A. E. Ryves*, for the appellant.

Dr. *Surendro Nath Sen* and Munshi *Gulzari Lal*, for the respondent.

CHAMIER and MUHAMMAD RAFIQ, JJ.—This appeal arises out of a suit by the respondent for recovery of Rs. 689-5-3 paid by him to the appellant Board on account of octroi upon some logs of wood imported by him into the municipality.

The first court dismissed the suit as barred by limitation under article 62, schedule I, to the Limitation Act. On appeal the District Judge held that the suit was governed, not by article 62, but by article 120, and, having been brought within six years of the accrual of the cause of action, was within time. Accordingly he remanded the suit for trial on the merits. The Board has appealed, contending that the suit is barred by limitation, either under article 2 or under article 62.

No evidence having been taken the question must be decided for the present on the plaint.

In paragraph 3 of the plaint the respondent says that the Board's officials demanded octroi on the logs; in paragraph 4 that he informed them that the logs were being imported for the use of the Government at the opium godown, and in paragraph 5 that he paid the sum demanded and a few days later produced a certificate from the Public Works department that the logs had been used for Government, but the Board improperly refused to refund the money.

If the respondent had alleged that the Board was wrong in demanding and taking octroi in the first instance, the suit would

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have been governed by article 62 schedule I to the Limitation Act See *Rajputana Malwa Railway Stores* v *Ajmere Municipal Board* (1) But the appellant does not seem to allege that the Board was wrong in taking octrol in the first instance He says that the Board was wrong in refusing a refund and in paragraph 6 of the plaint he gives the date of the refusal as the date on which the cause of action arose The decisions of their Lordships of the Privy Council in *Guru Das* v *Ram Narain* (2) and *Hanuman* v *Hanuman* (3) and other cases decided by courts in India seem to lay down that article 62 applies only when the money at the time of receipt can be said to have been received by the defendant for the plaintiff's use According to the respondent's allegation as we understand them the sum in question cannot at the time of receipt be said to have been received by the Board for the respondent's use His learned vakil says that the respondent takes his stand upon explanation II to Rule 27 of the Municipal Account Code That explanation, which is really an entirely distinct rule, is as follows —

"Goods, the property in which is not vested in the Government at the time they pass the barrier but which are imported with a view to the fulfilment of a Government contract, shall, on passing the barrier, be declared in writing as intended for the use of the Government, *e g*, in fulfilment of a certain specified contract The duty on them shall then be paid and subsequently, if they do become the property of Government, the duty shall be refunded on a certificate to the effect signed by the departmental officer concerned, provided that the application be made within fourteen days of the date of that certificate"

It is doubtful whether the respondent can bring the case within this rule, for it is nowhere stated that he made the requisite declaration in writing when the logs were at the octroi barrier, but this question is not now before us

His case being that the demand of octroi was rightful and that the refusal to refund was wrongful we must hold that article 62 is not applicable For the reasons given in the case first above cited we hold that article 2 also is not applicable The suit is

(1) (1910) I. L. R., 32 All. 491 (2) (1884) I L R 10 Calc, 860.

(3) (1893) I.L.R., 19 Calc., 123

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go into possession Her right is that if she gets peaceably into possession without force or fraud, she is entitled to remain in possession until her dower debt is paid If the widow has no legal right to take possession, such a right cannot descend to her heirs, because she never had it.

In our opinion the view taken by the court below was correct and we dismiss the appeal with costs.

Appeal dismissed

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June, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball

BENI RAM AND OTHERS (DEFENDANTS) v RAM CHANDAR (PLAINTIFF). *

Civil Procedure Code (1908), *order II, rule 2—Cause of action—Hundi given in discharge of debt on accounts—Failure of suit on hundi—Subsequent suit based on the accounts*

A debtor gave his creditor a hundi for the amount of his debt The creditor accepted the hundi, but the debtor failed to pay it at maturity. The creditor then sued the debtor on his hundi but failed to recover. *Held* that this was no bar to his suing on the accounts to recover the debt. The cause of action on the hundi was totally distinct from the cause of action in respect of the original debt. *Preonath Mukerji v. Bishnath Prasad* (1) doubted *Payana Reena Layana Saminathan Chetty v. Pana Lana Pana Lana Palaniappa Chetty* (2) referred to

THE facts of this case were as follows:—

There were commercial dealings between the plaintiff and the defendants. In October, 1909, a balance was struck, and it was found that Rs 4,000 odd were due by the defendants to the plaintiff. An arrangement was come to by which the defendants agreed to pay off this sum by monthly payments of Rs 50. Certain instalments were paid in pursuance of this arrangement and were duly credited to the defendants in the books of the plaintiff. Later on the plaintiff asked the defendants if they would accept a hundi for Rs 500 if the plaintiff drew the same upon them and that the plaintiff would credit the defendants with the Rs. 500 in the books being the amount of the hundi. The defendants agreed to this. The plaintiff drew the hundi, the defendants accepted it but did not pay the amount on due date. The plaintiff had to pay the hundi and then brought a suit against the defendants for the Rs. 500 This suit failed. The plaintiffs then instituted the

* First Appeal No. 13 of 1914, from an order of Austin Kendall, District Judge of Cawnpore, dated the 21st of November, 1913.

(1) (1900) I. L. R., 22 All., 256. (2) (1914) 18 C. W. N., 617.

present suit to recover the balance due by the defendants on their account, and obtained a decree. The defendants appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailash Nath Katju*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit brought under the following circumstances. There were commercial dealings between the plaintiff and the defendants. In October, 1909, a balance was struck, and it was found that Rs. 4,000 odd were due by the defendants to the plaintiff. An arrangement was come to by which the defendants agreed to pay off this sum by monthly payments of Rs. 50. Certain instalments were paid in pursuance of this arrangement and were duly credited to the defendants in the books of the plaintiff. Later on the plaintiff asked the defendants if they would accept a hundi for Rs. 500 if the plaintiff drew the same upon them and that the plaintiff would credit the defendants with the Rs. 500 in the books being the amount of the hundi. The defendants agreed to this. The plaintiff drew the hundi, the defendants accepted it but did not pay the amount on due date. The plaintiff had to pay the holder of the hundi and then brought a suit against the defendants for the Rs. 500. This suit failed. It is said that the defendants succeeded in getting the court to hold that their acceptance was forged and this matter need not be considered. All the facts stated above must be assumed for the purpose of the present appeal. The plaintiff has now instituted the present suit to recover the balance due by the defendants on their account. The defendants meet the suit with an objection based on order II, rule 2, which is as follows:—

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." "Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." "A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall

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not afterwards sue for any relief so omitted." "Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

It is contended by the defendants that the hundi mentioned above was a collateral security for the payment of money due on the accounts, and that it must be deemed to constitute the same cause of action.

In our opinion when the plaintiff sued alleging that the defendants had not paid the hundi which they executed, their cause of action was a totally different cause of action from the present one The only connection between the two suits was that the consideration for the alleged acceptance by the defendants of the hundi was the discharge of the debt to the extent of Rs 500

Strong reliance is placed on a decision of this Court in the case of *Preonath Mukerji* v. *Bishnath Prasad* (1). In that case a doctor agreed to attend a legal gentleman as his medical attendant on a fee of Rs. 100 a day. At the end of 7 days he gave the doctor a promissory note for Rs. 700 and he arranged to pay the balance by legal services to the doctor. Before the legal service to the doctor could be rendered the lawyer died A suit was brought on the promissory note and a decree obtained In the subsequent suit for the balance of the fee for medical service it was pleaded that the plaintiff was bound under the analogous provisions (section 43) of the Code of Civil Procedure then in force and that the suit was barred. The learned Judges held that this contention was well founded

It seems to us that the correctness of this decision is somewhat doubtful We would think it would be impossible to contend that where a promissory note is given in discharge for a debt that a suit based upon it is on the same cause of action as the one brought on the original contract For example A is indebted to B, and gives B a promissory note payable two months after date If A were to sue for the debt before the expiration of the two months, it would be a complete defence for [B] to prove the making

(1) (1900) I. L. R. 22 All., 256

acceptance of the promissory note This illustration itself shows that the causes of action are not the same

In the case of *Payana Reena Layana Saminathan Chetty* v *Pana Lana Pana Lana Palaniappa Chetty* (1), a recent case which came before their Lordships of the Privy Council the facts were as follows Certain disputes between the plaintiff and the defendant were referred to arbitration The arbitrators found a certain amount to be due from one party to the other and directed that this money should be paid by means of two promissory notes each for half the amount Suits were brought upon the promissory notes and failed for some technical reasons Thereupon the plaintiffs instituted a fresh suit for the money found to be due according to the award It was contended on behalf of the defendants (relying upon an exactly similar provision of the Ceylon Code) that the cause of action on the promissory note was the same as the cause of action in the suit, and that the latter was barred by provisions in the Code Their Lordships of the Privy Council after citing the provisions of the Code and the facts of the case, say as follows —" Viewed thus it is evident that a claim on the bills and a claim for the amount found due under the award and for which payment was provided by the agreement, are not the same cause of action but are in truth inconsistent and mutually exclusive causes of action So long as the bills were outstanding there was no right of action otherwise than upon the bills It is therefore impossible in their Lordships' opinion to hold that claim for the amount due was the same cause of action as the claim upon the bills and ought to have been included in the prior action "

It seems to us that the facts of the case before us are much stronger than the case we have just referred to We think the decision of the court below was correct and ought to be affirmed We therefore, dismiss the appeal with costs

Appeal dismissed.

(1) (1913) 18 C. W N. 617

1914
June, 17.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball

DAN DAYAL (PLAINTIFF) *v.* MUNNA LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), section 20 (c)—Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Calcutta—Suit filed in Mainpuri.

The plaintiff instituted his suit in the court of the Subordinate Judge of Mainpuri alleging that the defendants had by fraud obtained a decree against him in the High Court at Calcutta and praying that the decree might be set aside and an injunction issued restraining the defendants from executing it

Held that, as the defendants resided in Calcutta and the fraud (if any) complained of had been practised there, the Mainpuri Court had no jurisdiction to entertain the suit. *Banke Behari Lal* v. *Pokhe Ram* (1) distinguished. *Read* v. *Brown* (2) and *Umrao Singh* v. *Hardeo* (3) referred to.

THIS was a suit, instituted in the court of the Subordinate Judge of Mainpuri, in which the plaintiff claimed (1) that it might be declared that a decree obtained by the defendant No. 1 in the High Court at Calcutta was fraudulent and false and that it might be set aside as against the plaintiff and his father, and (2) an injunction to restrain the said defendant from taking out execution of the decree and directing him to release certain property from attachment. The Subordinate Judge held that the cause of action did not arise in Mainpuri and accordingly returned the plaint for presentation in the proper court. The plaintiff thereupon appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Babu *Sarat Chandra Chaudhri*, for the appellant.

Dr. *Satish Chandra Banerji* and Babu *Mangal Prasad Bhargava*, for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claimed that it might be declared that a decree obtained by the defendant No. 1 in the Calcutta High Court was fraudulent and false, and that it might be set aside as against the plaintiff and his father and an injunction to restrain the said defendant from taking out execution of the decree and directing him to release attached property from attachment.

The court below held that the cause of action did not arise in Mainpuri and accordingly returned the plaint for presentation in

* First Appeal No. 43 of 1914, from an order of Ladli Prasad, Subordinate Judge of Mainpuri, dated the 18th of February, 1914.

(1) (1902) I. L. R., 25 All., 48. (2) (1889) 22 Q. B. D., 128.
(3) (1907) I. L. R., 29 All., 418.

the proper court The plaintiff comes here complaining of this order. The foundation of the plaintiff's case is the granting of a decree in Calcutta, which is said to have been obtained by fraud. It appears that the decree was obtained in the year 1903, in the court of first instance and was confirmed by the appellate court in the year 1908 The present suit was not instituted until the year 1911. It is stated that the allegation of the plaintiff is that his father, who was named as one of several defendants, was never served throughout the litigation in Calcutta

Speaking generally, it seems to me that where a decree has been improperly obtained the proper and most convenient course is for the party aggrieved to go to the court that granted the decree and get it set aside by that court I do not wish to be taken, when making this remark, as expressing an opinion that a suit to set aside a decree will not lie Steps to set aside a decree, whatever the procedure, should be taken the moment a party has notice that the decree has been made The question which we have to decide, however, in the present appeal is the application of section 20 of the Code of Civil Procedure to the facts of the present case. Section 20 provides for the court in which the suit must be instituted. It is as follows :—

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants, where there are more than one at the time of the commencement of the suit actually and voluntarily resides, or carries on business or personally works for gain,

(b) any of the defendants, where there are more than one at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain as aforesaid, acquiesce in such institution, or

(c) the cause of action wholly or in part arises"

The defendant does not reside or carry on business in Mainpuri. Accordingly the present suit cannot be instituted in Mainpuri unless the cause of action wholly or in part arose there.

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The expression "cause of action" is perhaps a little difficult to define. In *Read* v. *Brown* (1), the expression was defined in the following words:—"A plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgement of the court." Now the fraud alleged in the present case is that a decree was made against him on the false allegation that he had been served, when in truth and in fact he had never been served. This is the fact which it would be necessary for the plaintiff to prove. If he succeeded in proving it, the decree would be set aside, and if the decree were set aside he would get all the relief to which he is entitled. It seems to me that all the plaintiff complains of happened in Calcutta and that therefore the cause of action arose in Calcutta and no place else. The plaintiff relies on the case of *Banke Behari Lal* v. *Pokhe Ram* (2). There the plaintiff brought a suit very like the present. The decree had been obtained in Calcutta, but certain property had been attached in execution of the decree in Cawnpore. A Bench of this High Court decided that part of his cause of action was the attachment of the property and that took place in Cawnpore and that consequently the suit could be maintained in Cawnpore. The learned Judges say, at page 53:—"In so far as the said decree and the compromise on which it was founded are alleged to have infringed the plaintiff's right, the cause of action arose in Calcutta where the decree was made and the compromise was admittedly entered into. The mere fact, however, of the passing of the decree did not materially affect the plaintiff until it was put into execution and the amount awarded by the decree was sought to be realized from the estate of Balmakund, of which the plaintiff claims to be the owner."

I may point out that in this case the plaintiff was no party to the suit in Calcutta. His allegations were that certain persons brought a fraudulent suit and then compromised, with the effect that the property which he claimed to be his was attached in Cawnpore. There is this important distinction between the facts of this case and the case before us.

During the course of the arguments the case of *Umrao Singh* v. *Hardeo* (3) was cited. In that case the suit was brought to set

(1) (1889) 22 Q B. D., 128.
(2) (1903) I. L. R., 25 All., 48.
(3) (1907) I. L. R., 29 All., 418.

aside a decree of the Small Cause Court at Calcutta on the allegation that it had been obtained against the plaintiff by fraud. This Court held that the suit could not be maintained at Agra.

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In my opinion the decision of the court below was correct and ought to be confirmed.

TUDBALL, J.—I fully agree with everything that the learned Chief Justice has said I would like to add that an attempt was made to distinguish the case which is now before us from the case of *Umrao Singh* v. *Hardeo* (1) It is pointed out that in the present case the plaintiff asked not only to have the decree set aside on the ground of fraud, but also that an injunction might be issued against the defendant restraining him from putting it into execution I fail to see how the addition of this relief in any way differentiates the two cases No court which granted the first relief, that is, the setting aside of the decree, would also issue an injunction against the defendant restraining him from executing the decree which it had already set aside In my opinion the addition of this unnecessary relief does not alter the case at all. The court below had no jurisdiction whatsoever to entertain the suit and its order is perfectly correct

BY THE COURT —The order of the Court is that the appeal be dismissed with costs

Appeal dismissed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice Mr Justice Tudball and Mr Justice Chamier.

1914 June, 23

RAJ NATH AND OTHERS (DEFENDANTS) v NARAIN DAS (PLAINTIFF) AND DARSI AND OTHERS (DEFENDANTS)*

Act No IX of 1908 (Indian Limitation Act) schedule I, articles 132 and 144—Limitation—Mortgage—Suit for sale on a mortgage impleading defendants alleged to be in adverse possession of the mortgaged property

Held that a suit for sale on a mortgage can always be brought under article 132 of the first schedule to the Indian Limitation Act 1908, against all persons in possession whose possession is subsequent to the date of the mortgage, provided that the suit is brought within twelve years from the time at which

*Second Appeal No 427 of 1913 from a decree of H W Lyle, District Judge of Agra, dated the 23th of January, 1913 confirming a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 12th of March, 1912

(1) (1907) I L R, 29 All., 418.

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e money became due. Such a suit does not become a suit for possession governed by article 144 because it may be necessary to implead persons who are in possession and claim a title by possession adverse to the mortgagor. *Karam Singh* v. *Basir Ali Khan* (1) distinguished. *Nandan Singh* v. *Jamman* (2) and *Amanatur Mandal* v. *Makhan Lal Dey* (3) referred to.

THE facts of this case were as follows: —

The plaintiff sued for sale upon a simple mortgage executed in 1874. He impleaded as defendants the heirs of the mortgagor and certain other persons (the present appellants) who were in possession of the mortgaged property. The heirs of the mortgagor did not defend the suit. The other set of defendants pleaded they were in adverse possession of the property for over 12 years and had thus acquired an absolute title to it and that accordingly the suit was barred by limitation. The court of first instance held that adverse possession for over 12 years as against the heirs of the mortgagor was established but that it had commenced in 1891 after the mortgage and so did not affect the rights of the plaintiff as a simple mortgagee. The suit was decreed and the decision was upheld by the District Judge on appeal by the contesting defendants. The contesting defendants appealed to the High Court.

On the appeal coming on for hearing before CHAMIER and RAFIQ, JJ., their Lordships made the following referring order: —

"This was a suit upon a simple mortgage made in 1874. The appellants were impleaded because they were in possession of the property. They pleaded that the suit was barred by limitation as against them as they did not claim under the mortgagor and had been in adverse possession of the property for more than 12 years before the suit.

"According to an unreported decision of the learned Chief Justice in S. A. No. [illegible] of [illegible] Basant v. [illegible], this was a good defence to the suit. To the same effect is an Oudh decision, *Pratap Bahadur Singh* v. *Maha* [illegible] *Baksh Singh* (4) in which one of us took part, and in which the opinion was expressed that the point was covered by the decision of their Lordships of the Privy Council in *Karam Singh* v. *Basir Ali Khan* (1). In the Madras High Court there have been two or two conflicting decisions on the point. See *Ramasami Chetty* v. *Perumal Pillai* (5) and *Pattabhiramier* v. *Vencatarow Naicken* (6) [illegible] was referred to a Full Bench but no decision was arrived at. See *Framji* [illegible] v. *Shamma* [illegible] (7). The later

(1) (1908) I. L. R., 30 All., 1.
(2) (1912) I. L. R., 34 All., 640.
(3) (1901) I. L. R., 23 Calc., 1[illegible]
(4) (190[illegible]) 2 Oudh Cases, [illegible]
(5) (19[illegible]) [illegible] M. L. J., [illegible]
(6) (19[illegible]) [illegible] M. L. J., [illegible]
(7) (19[illegible]) [illegible] M. L. J., 240.

case in this Court is that of *Nandan Singh* v *Jumman* (1) in which KNOX and KARAMAT HUSAIN JJ approved the decision in *Parthasarathi Naikan* v *Lakshmana Naikan* (2) and disapproved that in *Ramaswami Chetty* v *Ponna Padayachi* (3) and the Oudh decision

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'As much difference of opinion exists regarding the effect of the decision in I L R 5 All, page 1 we got out the original record and we find that all the five Judges of this Court who had to do with the case seem to have been of opinion that 12 years adverse possession of the mortgaged property by a stranger would bar a suit for sale upon a simple mortgage They seem to have attached no importance whatever to the fact that the mortgagee had not been entitled to possession of the property Both this Court and the Judicial Committee seem to have thought that article 145 schedule II of the Limitation Act was relevant to the case though viewed as a suit for sale on the mortgage, it seems to have been governed by article 132 of the same schedule. Apart from the decision of the Judicial Committee we should be disposed to dismiss the appeal, but in the circumstances we think that this appeal should be heard by a larger Bench and we direct that the file be laid before the learned Chief Justice for orders

The appeal then came up before a Full Bench

Pandit *Shiam Krishna Dar*, for the appellants —

The question is whether article 132 of the Limitation Act (in this case read with section 31 of the Act) applies only to a suit against the mortgagor and persons claiming under him, or applies also to a suit against a mortgagor and a trespasser The appellants who claim by adverse possession cannot be said to claim through the mortgagor, they are trespassers As between them and the mortgagee there is no privity of contract In a suit for sale upon a simple mortgage what is the cause of action of the mortgagee against a trespasser? The mortgagee has no cause of action other than his mortgage, and cannot bring a suit for sale against a stranger A suit for sale against a mortgagor and a trespasser is really not a pure and simple suit for sale upon a mortgage, but is a mixture of two suits As against the mortgagor it is a suit for sale upon the mortgage But as against the trespasser it involves something like a declaration of right or title Article 144 and not article 132 of the Limitation Act applies to a suit like the present one As against a trespasser the mortgagee is bound to come within 12 years of the commencement of the adverse possession to vindicate his title to

(1) (1912) I L R, 34 All, 640 (2) (1911) 21 M L J, 467
(3) (1910) 21 M L J, 897

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the mortgaged property; *Sheoumber Sahoo* v *Bhowaneedeen Kulwar* (1), *Ram Coomar Sein* v *Prosunno Coomar Sein* (2)

The case of *Ramaswami Chetty* v *Ponna Padayachi* (3) was a case of a simple mortgage like the present case There the question arose in a slightly different form The mortgagee obtained against the mortgagors a decree for sale, without impleading the trespassers Thereupon the trespassers sued for a declaration that they had become the owners of the property and that it could not be sold in execution of the decree It was held that where the mortgagor is dispossessed and his title disputed, and another person obtains possession, such possession becomes adverse to both mortgagor and mortgagee and the latter must come within 12 years of the commencement of the adverse possession Similarly, in the case of *Pratap Bahadur Singh* v *Maheshwar Baksh Singh* (4) it was held that adverse possession begins against a mortgagee from the date on which he is entitled to take action on his mortgage by suing for possession or sale and that in the case of a simple mortgage where the mortgagee is not entitled to possession 12 years' adverse possession against the mortgagor extinguished the security Another case, also of a simple mortgage, is that of *Ram Lal* v *Masum Ali Khan* (5).

The Privy Council case of *Karan Singh* v *Bakar Ali Khan* (6) supports my contention There the suit was for sale on the basis of a simple mortgage. At the time when the suit was brought one Karan Singh was in possession of the mortgaged property adversely to the heirs of the mortgagor Both the Full Bench of the High Court and the Judicial Committee of the Privy Council who dealt with the case, went at great length into the question as to whether the adverse possession had or had not been for over 12 years If in the case of simple mortgage adverse possession against the mortgagor could not be adverse possession against the mortgagee then it would not have been at all necessary in that case to go into the length of the period of the adverse possession

(1) N W P, H C Rep., 1870 223
(2) (1864) W R, Gap Number 875
(3) (1910) 21 M L J, 877
(4) (1905) 12 Oudh Cas 45
(5) (1903) I L R, 25 All, 25 (28)
(6) (1882) I L R, 5 All, 1

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents, was not called upon.

RICHARDS, C. J.—This appeal arises out of a suit upon a mortgage, dated the 8th of January, 1874. The suit was not instituted until the 13th of May, 1911. Both the courts below have granted a decree for sale of the mortgaged property. The defendants 6—11 have appealed. Their case is that they had acquired title by adverse possession as against the mortgagor and that, therefore, the present suit as against them is barred by limitation. Article 132 of the first schedule to the Limitation Act provides that a suit to "enforce payment of money charged upon immovable property may be brought within 12 years from the time when the money sued for became due." It is admitted here that, having regard to section 31 of Act No. IX of 1908, the present suit, as a suit under article 132, is within time. The appellants contend that so far as they are concerned the suit must be governed by article 144, which provides that a suit for possession of immovable property must be brought within 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. I may point out at the commencement that the suit is not a suit for possession of immovable property. It is precisely the suit that is mentioned in article 132. I may also point out that the plaintiffs, on the admitted facts, could never have brought a suit for possession of the property against any one under article 144 until after a suit under article 132 had been first brought. In my opinion a suit can always be brought under article 132 against all persons in possession whose possession is subsequent to the date of the mortgage, provided that the suit itself is brought within 12 years from the time upon which the money became due. The question would, I think, be free from all difficulty were it not for views taken by some of the courts of the decision of their Lordships of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (1). In that case a suit was brought upon mortgage bonds made in the months of January and October, 1862. Some of the defendants pleaded adverse possession. The High Court in Allahabad held that they had not been in adverse possession

(1) (1882) I.L.R., 5 All., 1.

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for more than 12 years and this decision was confirmed by their Lordships of the Privy Council, with the result that the plaintiffs got a decree for sale of mortgaged property. The curious part of the case is that it would appear that both in India and also before their Lordships of the Privy Council the suit was treated as a suit for possession, whereas in truth and in fact it was a suit for sale just like the present case. This may possibly have been due to the fact that the defendant's case was that his adverse possession had commenced before the mortgage was made. This was the argument which was put forward by the learned counsel for the appellant when arguing the case before their Lordships of the Privy Council, and their Lordships held on the facts of the case as proved that adverse possession did not commence until after the date of the mortgage. It, therefore, became quite unnecessary for their Lordships to decide what was the article of the Limitation Act which applied to the circumstances of the case. The case was decided against the defendants on the case they tried to substantiate. This decision of their Lordships of the Privy Council was cited in the case of *Aimadar Mandal* v. *Makhan Lal Day* (1). The learned Chief Justice held that the case did not apply. There seems to have been a division of opinion in Madras. As mentioned before, my only difficulty is the decision of their Lordships of the Privy Council; but having regard to the fact that no argument on the question ever took place before their Lordships and that it was quite unnecessary to decide the point, I do not think that the case can be regarded as in any way a binding authority upon this Court on the point in issue. I accordingly would dismiss the appeal.

TUDBALL, J.—I concur. The question now before us is discussed at considerable length in the case of *Nandan Singh* v. *Jumman* (2). I fully agree with all that has been said there and have no reason to add anything further.

CHAMIER, J.—I had to decide this question some years ago, and I then thought it was in reality governed by the decision of their Lordships of the Privy Council in *Karan Singh* v. *Bakar Ali Khan* (3). Both this Court and their Lordships of the

(1) (1906) I. L. R., 33 Calc., 1015. (2) (1912) I. L. R., 34 All., 640.
(3) (1882) I. L. R., 5 All., 1.

Privy Council seemed to me to have held that time began to run against the plaintiff under article 145 of the second schedule to the Limitation Act of 1871, from the date on which the possession of Karan Singh began, because that possession was adverse to the plaintiff. What has since been put forward, as an explanation of the decision of this Court and of their Lordships of the Privy Council, does not seem to have occurred to any of the five Judges who dealt with the case in this Court, or to any of their Lordships who heard the appeal, and I must say that to my mind the explanation is neither sufficient nor satisfactory But as some learned Judges of this Court and of the Madras High Court have recently expressed the opinion that the decision of their Lordships should not be regarded as covering a case of this kind, I defer to their opinion with a view to secure uniformity of decision If the decision of the Privy Council is not applicable to the case then in my opinion the case is clear On this ground I agree with the learned Chief Justice in dismissing the appeal.

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BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed

APPELLATE CIVIL.

Before Sir Henry Richards, Knight Chief Justice and Mr Justice Tudball.

1914 *June, 24*

ABDUL HAMID (PLAINTIFF) v MASIT ULLAH AND OTHERS (DEFENDANTS)*

Pre-emption—Pleadings—Muhammadan law—Custom—Amendment of plaint—Discretion of Court

The plaintiff in a suit for pre emption based his claim upon the Muhammadan law At a somewhat late stage in the case the plaintiff asked leave to amend his plaint by adding an alternative claim based on custom as evidenced by the wajib-ul-arz but this was refused, and the Court, notwithstanding that it found that, according to the wajib ul-arz a custom of pre-emption existed, dismissed the suit *Held* that the Court ought to have permitted the plaint to be amended, and, even without amending the plaint, was competent to decree the claim on the basis of the wajib ul arz

* Second Appeal No 1195 of 1913, from a decree of C E Guiterman, Additional Judge of Moradabad, dated the 21st of August, 1913 confirming a decree of Kunwar Sen, Additional Subordinate Judge of Moradabad, dated the 19th of May, 1913.

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THIS was a suit for pre-emption The sale dates back to the year 1910 and the present suit was instituted the same year The plaintiff based his suit on Muhammadan law When the suit had been pending for some time (apparently as a reply to paragraph 2 of the written statement) the plaintiff applied to the court for leave to amend the plaint by claiming pre-emption under Muhammadan law and in the alternative under the wajib ul arz The Court refused to grant this amendment on the ground that it would alter the nature of the cause of action The Court then proceeded to try the case as a case based on Muhammadan law It found that the conditions of Muhammadan law had not been fulfilled and dismissed the plaintiff's suit The plaintiff appealed The learned District Judge held that an application for amendment might have been made but it was made altogether too late It seems to have assumed that a custom of pre-emption did prevail, and then dismissed the suit without deciding any other issues It held that inasmuch as a custom of pre-emption prevailed a claim under the Muhammadan law could not be sustained The plaintiff thereupon appealed to the High Court

Dr *Satish Chandra Banerji* and Maulvi *Muhammad Ishaq* for the appellants

Mr *B E O Conor* and The Hon'ble Dr *Tej Bahadur Sapru*, for the respondents

RICHARDS C J and TUDBALL, J —This appeal arises out of a suit for pre-emption The sale dates back to the year 1910 and the present suit was instituted the same year The plaintiff based his suit on Muhammadan law When the suit had been pending for some time (apparently as a reply to paragraph 2 of the written statement) the plaintiff applied to the Court for leave to amend the plaint by claiming pre-emption under Muhammadan law and in the alternative under the wajib ul arz The Court refused to grant this amendment on the ground that it would alter the nature of the cause of action The Court then proceeded to try the case as a case based on Muhammadan law It found that the conditions of Muhammadan law had not been fulfilled and dismissed the plaintiff's suit The plaintiff appealed The learned District Judge held that an application for amendment might have been made but it was made altogether too late It seems to have

assumed that a custom of pre emption did prevail, and then dismissed the suit without deciding any other issues It held that, inasmuch as a custom of pre emption prevailed, a claim under the Muhammadan law could not be sustained

In our opinion where a plaintiff seeks pre emption, he ought to be allowed to put his case in the alternative and we think that in the present case the amendment should have been allowed, but even without an amendment the court could have decreed the plaintiff's claim under the custom if it found that such a custom prevailed and the plaintiff brought himself within it The real object of the suit was to get possession by pre emption, and such a course could not possibly have taken the other side by surprise, because it was the defendant who was setting up the existence of the custom in order to defeat the plaintiff's claim under the Muhammadan law In effect the judgement of the lower appellate court has refused the plaintiff a decree for pre emption on the ground that a custom exists under which he has a right to get it We wish it clearly to be understood that in the foregoing remarks we are in no way expressing any opinion on the merits of the case For example the court of first instance has held that the plaintiff was offered this property in the first instance and refused to take it If this should turn out to be the fact, the plaintiff cannot possibly succeed either under the Muhammadan or customary law Another point which has not been gone into by the courts is whether or not assuming that there is a custom of pre-emption prevailing in the village, it applies to the property the subject matter of the present suit We may point out that it does not follow that because there is a custom of pre-emption amongst the zamindars there is also a custom of pre emption prevailing between muafidars An extract from the wajib-ul arz might under certain circumstances be sufficient to prove the existence of the custom between the zamindars while it would be quite insufficient to prove the existence of the custom between muafidars

Before finally deciding the appeal we think it desirable to send down certain issues to the court below We accordingly refer the following issues —

(1) Did the plaintiff refuse to purchase the property ?

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(2) Does any custom of pre-emption prevail which applies to the property the subject matter of the suit and if so, is the plaintiff entitled under that custom to a decree in respect of the property which formed the subject matter of the two sale deeds?

(3) Did the plaintiff perform the conditions required by the Muhammadan law?

(4) What was the real price?

If the court finds it convenient without dislocating its business it will dispose of these issues as soon as possible. The parties may adduce further evidence relevant to the second issue but to no other issue. On return of the findings the usual ten days will be allowed for filing objections. The case will be put up early on return of the findings.

Issues remitted.

FULL BENCH

1914 August

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox and Justice Sir Pramada Charan Banerji.

EMPEROR v. CHIRANJI LAL.*

Act No. III of 1907 (Provincial Insolvency Act), sections 43 and 46—Additional District Judge—Order punishing debtor for fraudulent dealings with account books—Appeal, whether appeal civil or criminal and to what court.

Held by RICHARDS, C.J., and BANERJI, J., (KNOX, J., dissenting) that an appeal from an order of an Additional District Judge under section 43 (2) of the Provincial Insolvency Act, 1907, lies directly to the High Court and not to the Court of the District Judge. *Makhan Lal v. Sri Lal* (1) followed.

Held also by RICHARDS, C.J., and KNOX and BANERJI, JJ., that such an appeal is an appeal on the civil side of the Court and not a criminal appeal.

THIS case first came up for hearing before a single Judge, who referred it to a Bench of two Judges, but was eventually on a recommendation by the Division Bench laid before a Full Bench.

The facts were as follows:—

On the application made by the applicant to be declared an insolvent he was asked by the Court to deposit his account books. He filed an affidavit showing that the books had been taken to another district to be used as evidence in a case pending there

* Criminal Appeal No. 600 of 1914 from an order of Pitambar Dat Joshi, Second Additional Judge of Aligarh, dated the 1st of July 1914.

(1) (1912) I. L. R., 34 All., 572.

and had been stolen on their way back from that district The court disbelieved the statements contained in the affidavit and took evidence and passed an order convicting the petitioner for concealing or destroying the books under section 43 of the Provincial Insolvency Act and sentenced him to two months imprisonment This was an appeal against that order

Mr *G W Dillon* (with him Mr *Jawahar Lal Nehru*) for the appellant —

[On the question arising as to whether a civil or a criminal appeal should have been filed in the case counsel submitted that he was prepared to amend the grounds of appeal and make it a civil appeal if the Court was of opinion that a civil appeal should have been filed As both the appeals lay in the High Court it made no material difference to him]

The Government Pleader (Babu *Lalit Mohan Banerji*), for the Crown raised a preliminary objection to the effect that an appeal in the case did not lie to the High Court but to the District Judge

Mr *G W Dillon* submitted that there were two questions for decision in the appeal —

(1) The proceedings in insolvency having been had in the court of the 2nd Additional Judge of Aligarh and the order of conviction having been passed by that court the matter for decision was if an appeal lay to the High Court or to the District Judge of Aligarh

(2) The second point was if the order of conviction was good

Section 46 of the Provincial Insolvency Act provided for appeals It laid down that any person aggrieved by an order made by a District Court in certain matters mentioned therein otherwise than in appeal might appeal to the High Court. An Additional Judge though departmentally under the control of the District Judge had the same jurisdiction in insolvency matters as the District Judge Section 8 of the Bengal North Western Provinces and Assam Civil Courts Act laid down that Additional Judges " shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions they shall exercise the same powers

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as the District Judge." With a view to a division of work in the Aligarh district the District Judge and the two Additional Judges have divided certain local areas between themselves and the present application was accordingly filed "in the court of the 2nd Additional Judge of Aligarh" Section 20 of the Bengal North Western Provinces and Assam Civil Courts Act provided that ' save as otherwise provided by any enactment for the time being in force an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court There was nothing in the Insolvency Act which limited the above provision unless it was section 46 of the Insolvency Act

By clause 2, section (2), of the Insolvency Act ' all words and expressions defined in the Code of Civil Procedure shall have the same meaning as those respectively assigned to them in the said Code" The word "subordinate" used in section 46 of the Insolvency Act has not been defined by the Code of Civil Procedure. For the purposes of insolvency proceedings the court of an Additional Judge was not subordinate to that of the District Judge and an appeal against the order of the Additional Judge had been rightly preferred to the High Court. Section 39 of the Bengal, North Western Provinces and Assam Civil Courts Act did not apply to the present case, *Makhan Lal* v. *Sri Lal* (1)

The Government Pleader (Babu *Lalit Mohan Banerji*) for the Crown, submitted that section 3 of Bengal, North Western Provinces and Assam Civil Courts Act showed that the court of an Additional Judge was a different class of court from that of the District Judge. Section 9 of the above Act made all the Civil Courts (including the court of the Additional Judge) subject to the administrative control of the District Judge. By section 39 of the Act the court which was subject to the administrative control of the District Judge was a court of an inferior grade to that of the District Judge The Court of an Additional Judge was therefore a court of an inferior grade to the court of the District Judge The word "subordinate" was not defined anywhere but section 3 of the Code of Civil Procedure made every Civil Court of a grade inferior to that of a District Court subordinate to the District Court An appeal from an order of the

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Additional Judge under section 46 of the Insolvency Act therefore lies to the District Judge In section 20 of the Bengal, North-Western Provinces and Assam Civil Courts Act the words "save as otherwise provided" showed that it was not impossible for an appeal from an Additional Judge's order to go to the District Judge and section 46 of the Insolvency Act provided for such an appeal

RICHARDS C. J —Chiranji Lal applied to be declared an insolvent The case came before the Second Additional Judge of Aligarh, and he in exercise of the jurisdiction conferred upon the court by section 43 of the Provincial Insolvency Act of 1907, ordered the debtor to be imprisoned for a term of two months for having fraudulently or vexatiously concealed books of account The debtor Chiranji Lal appealed to this Court against the order of the Second Additional Judge.

A preliminary objection was taken against the hearing of the appeal to the effect that an appeal did not lie to the High Court, but lay to the District Court. Section 8 of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887) provides for the appointment by Government of Additional Judges Clause (2) of the same section provides that the Additional Judges so appointed shall discharge *any of the functions of the District Judge* which the District Judge may assign to them, and in discharge of those functions shall exercise the *same powers as a District Judge* There is no doubt that the Second Additional Judge was duly appointed under section 8 and there can be no doubt that the District Judge assigned to the Second Additional Judge the disposal of this particular insolvency application

It seems to me that there can be also no doubt th[illegible] clause (2) of section 8 the District Judge had authority [illegible] the petition in question to the Second Additional Jud[illegible] 20 provides that save as otherwise provided by any [illegible] for the time being in force, an appeal from a d cre[illegible] District Judge or Additional Judge shall lie to the H[illegible]

In my opinion these provisions make it quit[illegible] appeal in the present case lay to the High Court [illegible] Judge who dealt with the matter is a District Jud-

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It was contended by the objectors that under the provisions of section 46 of the Provincial Insolvency Act of 1907 an appeal from an order of a court subordinate to the District Judge lies to the District Judge, and it is argued that the Second Additional Judge was a court subordinate to the District Court within the meaning of section 46, clause (1) In support of this contention section 39 of the Bengal North Western Provinces and Assam Civil Courts Act is cited This section provides as follows — For the purposes of the last foregoing section the presiding officer of a court subordinate to the administrative control of the District Judge shall be deemed to be immediately subordinate to the court of the District Judge and for the purposes of the Code of Civil Procedure the court of such an officer shall be deemed to be of a grade inferior to that of the court of the District Judge It seems to me that this is a clause providing that for the specified purposes mentioned in section 39 and for this purpose only a court is to be deemed subordinate or of a lower grade to the court of the District Judge It cannot override the other clear provisions to which I have referred A Bench of this Court has already considered this question in the case of *Makhan Lal* v *Sri Lal* (1) The view taken by the learned Judges in that case was that the appeal from an order of the Additional Judge lay to the High Court and not to the District Judge I entirely agree with the view taken by the learned Judges in that case and I would overrule the preliminary objection.

KNOX J —I regret finding myself unable to follow the view taken by my brother Judges in this matter So far as I am aware when the Legislature intends that an appeal from an Additional Judge shall lie to the High Court it makes special provision for the purpose As for instance in section 20 of Act No XII of 1887 It seems to me that the Provincial Insolvency Act No III of 1907, intended that the court having jurisdiction under the Act should be the District Court and courts which were authorized by the Local Government with the previous sanction of the Governor General Council to exercise such jurisdiction If it had been intended that an appeal from an Additional Judge

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should lie direct to this Court it would have been very simple for the Legislature to have said in section 46 (2) —"Any person aggrieved by an order made by the District Court or the Additional Judge under section . ." In the absence of special words conferring a right of appeal from an Additional Judge to the High Court, I am not prepared to hold that an appeal would so lie I can quite understand that the Legislature may have intended that matters of this kind, which called for speedy decision, should, if there was an Additional Judge in the first instance, be referred to and at once decided by the District Court on the spot.

BANERJI, J.—The question to be determined in this case is whether an appeal from the order of the Second Additional Judge lay to this Court or to the court of the District Judge In support of the contention that the appeal lay to the District Judge reference is made to section 46 of the Provincial Insolvency Act, which is to the effect that a person aggrieved by an order made in the exercise of insolvency jurisdiction by a court subordinate to the District Court, may appeal to the District Court It is urged that the court of the Additional Judge is subordinate to the District Court within the meaning of the section and that therefore no appeal lies to this Court. I am unable to agree with this contention. I am clearly of opinion that the court subordinate to the District Court, referred to in section 46, sub section (1), is the subordinate court mentioned in section 3 of the Act, that is to say, a court subordinate to the District Court which has been invested by the Local Government with the previous sanction of the Governor General in Council by notification in the Local Official Gazette with jurisdiction in Insolvency matters Had it been intended that the court of an Additional Judge should be deemed to be a subordinate court within the meaning of the section, it would have been distinctly provided in the section in the case of Additional Judges that they shall be deemed to be subordinate to the District Court in the same way as Courts of Small Causes have been declared to be subordinate to the District Court.

It is next urged that an Additional Judge is under the Civil Courts Act, No XII of 1887 subordinate to the District Court.

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This contention also is, in my opinion, untenable Section 3 of the Civil Courts Act defines the different classes of civil courts, but, except for the purposes of administrative control and for the purposes mentioned in section 39 of the Act, the court of an Additional Judge is not declared in the Act to be subordinate to the court of the District Judge Section 8 of the Act provides that an Additional Judge appointed by *the Government is competent* to discharge any of the functions of a District Judge which the District Judge may assign to him and in discharge of those functions he shall exercise the same powers as the District Judge One of the functions of the District Judge is *to try* insolvency matters, and under the provisions of this section *the District* Judge is competent to assign that function to the Additional Judge *in any particular case or in any class of cases* In the discharge of those functions the Additional Judge exercises the powers of the District Judge as such, and it cannot be said that an appeal from an order made by him in the exercise of those functions lies to the District Judge, who himself can exercise no higher functions in regard to those matters By section 20 of the Civil Courts Act an appeal from an order of an Additional Judge lies to the High Court Therefore in the present case the appeal in my opinion lay to this Court and the preliminary objection has no force I may add that there can be no more inconvenience in allowing an appeal to this Court from the order of an Additional Judge than from the order of the District Judge

Mr *G W Dillon*, for the appellant, dealing with the merits of the case submitted that when criminal proceedings are started against any person he should be informed of the nature of those proceedings No notice was given to the appellant that he was being dealt with under the penal clause of section 43 of the Insolvency Act There must be something in the nature of a charge before any person is convicted of any offence, *Amiruddi Karikar* v *Jadav Karikar* (1) There could be no conviction under section 43 of the above Act on evidence recorded on objections to the applicant's insolvency petition Evidence in the criminal proceedings should have been recorded *de novo* *Nathu Mal* v *The District Judge of Benares* (2) If the petitioner

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knew he was being proceeded against criminally he would not have made any statement at all and the burden of proof being on the prosecution there would have been no evidence on the record against the appellant

The Government Pleader (Babu *Lalit Mohan Banerji*) for the Crown was not heard in reply on this point

RICHARDS C J and KNOX and BANERJI JJ —We are all unanimously of opinion (assuming that an appeal did lie to the Court in the case) that it comes before this Court as a first appeal from order on the Civil Side We, therefore treat the case as such Mr *Dillon* has addressed us on the merits of the case and has argued that there was no proper charge of having committed any offence under section 43 of the Provincial Insolvency Act and has called our attention to the case of *Amiruddi Karikar* v *Jadav Karikar* (1) and also to the case of *Nathu Mal* v *The District Judge of Benares* (2) In our opinion having regard to the facts of the present case the debtor had every opportunity of knowing that an inquiry was being made as to whether he did not conceal and was not concealing his books of account He got every opportunity of showing to the court that he had not done this Under these circumstances we see no reason to interfere with the order of the court below and we accordingly dismiss the appeal. The appellant must now surrender to his bail and serve out the remainder of the sentence

Appeal dismissed

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